Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

JUAN RAMON ROMO ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Fifth Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves the largest personal injury award affirmed on appeal in United States history: a $290 million punitive damage verdict in a product liability lawsuit that arose from a single traffic accident, and that was based on an alleged defect in a vehicle designed more than a quarter-century ago. The award is 63 times the compensatory award, 362 times the maximum available civil fine, and 29,000 times the maximum available criminal fine. The questions presented are:

1. Whether, in reinstating a $290 million verdict to punish an automaker for a 25-year-old design feature that surpassed federal safety standards, comported with industry custom, and had never before been found defective, the California Court of Appeal improperly nullified the three excessiveness guideposts articulated in *BMW v. Gore*, 517 U.S. 559 (1996), and produced an award that violates due process.

2. Whether the California Court of Appeal erred by holding, in conflict with *BMW* and *White v. Ford Motor Co.*, 312 F.3d 998 (9th Cir. 2002), that a single California jury could use its verdict to deprive petitioner of its total nationwide profits from sales of the product at issue.

3. Whether, in applying the *BMW* guideposts *de novo* as required by *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the California Court of Appeal erred by holding, contrary to the decisions of other courts, that reviewing courts should give conclusive weight to all findings of fact that the jury *might* have made, rather than findings the jury *must* have made, and by deferring to what the court acknowledged was a "huge" and "somewhat arbitrary" punishment.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Plaintiff Juan Romo, in addition to bringing suit in his individual capacity, is proceeding as guardian ad litem for his sisters Evangelina and Maria Romo, and as administrator of the Estates of Ramon, Salustia and Ramiro Romo.

Ford Motor Company has no parent corporation, and no publicly held company owns ten percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ford Motor Company ("Ford") respectfully petitions this Court for a writ of certiorari to review the judgment of the California Court of Appeal in this case.

OPINIONS AND ORDERS BELOW

The court of appeal's June 28, 2002 opinion reinstating the $290 million verdict (Pet. App. 1a-41a) is reported at 99 Cal. App. 4th 1115. The trial court's new trial order setting aside that verdict (Pet. App. 42a-46a) is unreported.

JURISDICTION

The court of appeal entered its judgment on June 28, 2002. The California Supreme Court denied Ford's timely petition for review on October 23, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause provides: "No State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. CONST., amend. XIV, § 1.

The Commerce Clause provides: "The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." U.S. CONST., art. I, § 8, cl. 3.

STATEMENT OF THE CASE

This case, along with the petition in *Ford Motor Co. v. Smith*, No. 02-____ ("Ford's *Smith* Pet."), which is being filed contemporaneously, graphically illustrates how, in the product liability context, lower courts are nullifying this Court's decisions in *BMW* and *Cooper Industries*.

Adopting the approach of many lower courts, the court of appeal invoked the fact that this is a product liability case involving personal injury to justify its evasion of all three *BMW* guideposts, and it then reinstated a $290 million verdict that the trial judge had overturned as "fundamentally suspect" and tainted by juror misconduct reflecting bias and

prejudice. The court branded Ford's conduct "grossly reprehensible" without regard to Ford's good faith basis for believing its design decisions were lawful. Pet. App. 38a. The court held that the *BMW* ratio guidepost is of "reduced . . . importance" in wrongful death cases, and pronounced the third guidepost—comparable penalties—wholly "inapplicable." Pet. App. 39a. The court held that Ford's "enormous monetary resources" provided "fair notice" that such a huge fine could be imposed (*id.* at 36a)—contradicting other courts in the process—and expressly rejected Ford's argument that it violated *BMW*'s ban on extraterritorial punishment to premise the punitive award on Ford's nationwide sales and overall profits on the vehicle, Pet. App. 38a-39a & n.3, thus creating a direct conflict with the Ninth Circuit's recent decision in *White*, 312 F.3d 998. The California Supreme Court denied review by a 4-3 vote. Pet. App. 47a-48a.

This Court's ruling in *State Farm Mutual Automobile Insurance Co. v. Campbell*, No. 01-1289 (argued December 11, 2002), may well address many of the issues raised by this petition, and the Court should at the very least hold this case pending its decision in *State Farm*. But this case also presents the Court with a unique opportunity to resolve important, recurring, and distinct questions that have divided and confused the lower courts regarding the meaning of *BMW* in the product liability context, an area where juries have returned a flood of massive punishments in recent years. Plenary review by this Court is warranted.

1. This case arises from a single accident involving a 15-year-old used 1978 Ford Bronco. On June 20, 1993, the Romo family had been driving all night when another vehicle cut off their Bronco on a California highway. The Bronco's driver, Juan Romo, swerved to the right, then back to the left, crossing both lanes of traffic at about 65 miles per hour and plowing onto the dirt shoulder of the road along the median. When he jerked the Bronco sharply to the right at about 50 miles per hour, it rolled over "several times." Pet. App. 2a. Ramon and Salustia Romo and their son Ramiro were killed, and Juan, Evangelina, and Maria Romo were injured.

Plaintiffs brought strict product liability and negligence claims against Ford, alleging that the Bronco's roof was defectively designed and manufactured because it did not withstand the forces generated by the rollovers. Plaintiffs also alleged that Ford had negligently failed to warn consumers of that purported defect.

It was not disputed that the 1978 Bronco's roof—the front third of which was made of metal, the rear two-thirds of removable fiberglass—was comparable to the designs of other sport utility vehicles ("SUVs") of that era, including the Jeep and the International Harvester Travelall. Reporter's Transcript ("RT") 2517-19, 2592, 6815-16. Further, although the 1978 Bronco had been designed a quarter-century before trial, at a time when there was no federal roof strength requirement for SUVs such as the Bronco, it was undisputed that the 1978 Bronco's roof was strong enough to surpass by 100 percent the federal government's then-existing roof strength requirements for passenger cars. RT 6864-67. In fact, the 1978 Bronco outperformed by 30 percent *today's* roof strength standard for SUVs, which the National Highway Traffic Safety Administration ("NHTSA") did not promulgate until 1994. RT 6866-67.

The trial court rejected Ford's proposed jury instructions that would have informed the jury of the relevance of these and other factors to the punitive damages calculation. Pet. App. 49a-53a; RT 9449-50. The court also denied Ford's motion *in limine* to exclude under *BMW* evidence of its wealth and out-of-state sales and profits. Clerk's Transcript ("CT") 177-86; RT 343-46.[1] As a result, plaintiffs' counsel was free to, and did, argue that the jury should inflict a punishment based on Ford's worldwide wealth and nationwide sales of the Bronco, sufficient to change the behavior of Ford and consumers throughout the Nation. For instance, plaintiffs' counsel asserted that Ford had made $160 million in

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[1] Under California law, Ford's motion *in limine* sufficed to preserve its objection. *People v. Rowland*, 4 Cal. 4th 238, 263-64 n.3 (1992); *Summers v. A.L. Gilbert Co.*, 69 Cal. App. 4th 1155, 1184 (1999).

profits on nationwide sales of 1978-79 Broncos, and urged jurors to award "a billion dollars in punitive damages" to make "the front page of U.S.A. Today . . . the front page of the New York Times . . . [and] the front page of the Wall Street Journal." RT 9585-88. He told jurors that "[y]ou've got to say a number that gets on the front page of every newspaper in the country" and "get[s] the world's attention." RT 9588-89.

Even though the case involved a single accident, even though the roof design was incorporated in 140,000 vehicles and had never been found to have caused any other injury in 25 years,[2] even though no person had ever petitioned NHTSA to find the design unsafe, and even though NHTSA had been regulating roof-crush performance and evaluating accident data for decades, plaintiffs' counsel urged the jury to "educate NHTSA" by returning a huge verdict against Ford. RT 9591. Counsel insisted that "[i]t isn't just government" that can "change the vehicles," and incited the California jury to "[t]ake this car out of its existence" and "stop that mother in Montana from putting her children in the back of the car." *Id.* at 9999-10000. He emphasized that this was "an important verdict for . . . the whole country." *Id.* at 9473.

The jury acted accordingly. Although it rejected plaintiffs' failure to warn claim, it returned a verdict for plaintiffs on their manufacturing and design defect claims, holding Ford 78 percent responsible for plaintiffs' injuries (and allocating 10 percent of the fault to Juan Romo, and 12 percent to the other driver). Pet. App. 3a. It awarded $6.2 million in compensatory damages, $4.6 million of which was assessed against Ford. *Id.* Then, by a vote of 9-3—the minimum nec-

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[2] Plaintiffs' counsel admitted during closing argument that "there's no evidence that there's any lawsuits with respect to 1978-79 Broncos before. . . . There's been no evidence of that." RT 9990.

essary for a verdict—the jury found Ford guilty of "malice" and imposed $290 million in punitive damages. *Id.*[3]

2. In its post-trial motions, Ford, *inter alia*, reiterated its Due Process and Commerce Clause arguments, asserted that the $290 million verdict was unconstitutionally excessive, and moved for a new trial on juror misconduct grounds. Supplemental CT 1-37; CT 3400-20.

The court, finding that prejudicial juror misconduct occurred during deliberations, granted a new trial on punitive damages. The court found that one juror, in violation of the court's admonitions, had "told other jurors of a '60 Minutes II' program which aired [during the trial] and that featured alleged fire problems from rear-end collisions involving older Ford Mustangs" as well as "graphic depictions of the burn injuries suffered" by passengers. Pet. App. 44a. The court had excluded evidence of Mustang and other rear-impact fires as irrelevant and unduly prejudicial in this non-fire, non-rear-impact case. RT 329-33, 6360-62, 6377-82.

The same juror also (inaccurately) told other jurors that Lee Iacocca, who had been Ford's president during the Bronco's development and had often been mentioned during trial, had said on the show that Ford's policy was to defend or settle lawsuits rather than recall vehicles or correct defects.[4] Pet. App. 44a. This juror "actually stated that the interview with Lee Iacocca showed Ford's malice," CT 1649, justifying punitive damages. Pet. App. 44a.

Another juror, "after repeatedly telling the jurors that they needed to 'save the babies,' . . . told the jury in great detail of a morbid nightmare she supposedly had the night before in which her child and the other jurors' children were killed by a repeatedly rolling-over Bronco while the Ford at-

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[3] In an unintentional tort case, California defines "malice" as "despicable conduct" carried on with a "willful and conscious disregard for the rights or safety of others." CAL. CIVIL CODE § 3294(c).

[4] As the trial court found, Iacocca made no such statement on the program. Pet. App. 44a.

torneys and witnesses, armed with guns, mockingly chanted, 'Where's the proof, where's the proof?'" Pet. App. 44a. This juror also repeatedly told her fellow jurors that they "did not need to follow the law because saving babies was too important." *Id.* (quotation marks omitted).

The trial court ruled that, in light of this misconduct, "[f]airness dictates a new trial on the issues of malice and punitive damages." Pet. App. 45a. The court explained: "Juror misconduct occurred by virtue of the injection of external evidence and influences, prejudgment of the case, and a refusal to follow the law." *Id.* The court found that "the deliberative process on [punitive damages] was presumptively infested with passion and prejudice," rendering the verdict "fundamentally suspect." *Id.*

3. The court of appeal reversed. The court rejected the trial court's conclusions regarding juror misconduct by simply "presum[ing]" that the trial court's generic instructions and the foreperson's admonitions would have cured any prejudice. Pet. App. 14a. In addition, although the court recognized that the unprecedented amount of the award was "somewhat arbitrary," *id.* at 37a, it nevertheless reinstated the entire $290 million penalty.

In applying *BMW*, the court performed what it characterized as a *de novo* review under *Cooper Industries*. In fact, however, the court simply incorporated its highly deferential "substantial evidence" review under state law, assuming that the jury resolved every contested factual issue against Ford. Pet. App. 20a. The court also disregarded Ford's undisputed compliance with federal safety standards and industry custom. Even though it could not point to any evidence that any individual Ford employee had acted with malice or believed that the company was "compromis[ing] consumer safety" when designing the Bronco, *id.* at 32a, the court deemed

Ford's conduct "grossly reprehensible" and "despicable" because it resulted in personal injury. *Id.* at 30a, 38a.[5]

Although conceding that the "great disparity between the compensatory and punitive damages award" supported an excessiveness finding, the court deemed that great disparity to be immaterial "because wrongful death compensatory damages do not fully reflect the harm to the victims." *Id.* at 39a. Similarly, the court held *BMW*'s "comparable penalties" guidepost wholly "inapplicable" because the "malicious conduct could have resulted in substantial imprisonment if committed by an individual rather than a corporation." Pet. App. 39a.

The court also rejected Ford's argument that *BMW* precluded punishing Ford based on *nationwide* sales of the Bronco, and punished Ford based on its "over $100 million" in profits from such sales. Pet. App. at 36a. The court claimed this was justified because "the interest California seeks to protect—individual human lives—is neither unique to California nor limited to its own citizens." *Id.* at 38a-39a & n.3.

Citing Ford's financial status at the time of trial in 1999, the court held that Ford "has been on notice 'for more than a century' that California regards it as necessary to impose penalties related to the wealth of the defendant," and thus upheld the $290 million award because Ford "is a huge company with enormous monetary resources." *Id.* at 36a, 40a.

REASONS FOR GRANTING THE WRIT

In *BMW*, this Court held that the Due Process Clause forbids "grossly excessive" punitive damage awards, and that claims of excessiveness are to be evaluated by reference to three "guideposts"—reprehensibility, ratio, and comparable penalties—to determine whether the defendant had "fair notice" of the severity of the punishment that could be imposed.

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[5] The court even went so far as to deem Ford's safety *improvement* to the 1980 Bronco's roof design further proof of Ford's *reprehensibility* as to the 1978 model. Pet. App. 35a.

517 U.S. at 574-85. Notwithstanding that clear directive, the court below held that the three *BMW* guideposts are either inapplicable or essentially meaningless in product liability cases. With respect to the reprehensibility prong, for example, the court held that mere awareness that a product poses a potential risk of personal injury (no matter how small) suffices to establish gross reprehensibility, notwithstanding the defendant's compliance with government and industry standards and its good faith belief that the risk was not unreasonable. As shown below, that holding is irreconcilable with *BMW*, and contradicts longstanding punitive damage doctrine applied by state and federal courts around the country.

The court of appeal created a further conflict by holding that the ratio prong has reduced significance in wrongful death cases, and that a punitive damage award that is 63 times the very substantial compensatory award suffers from no constitutional infirmity. In addition, the court of appeal squarely held that the comparable penalties prong is "inapplicable" whenever the underlying conduct could result in imprisonment if committed by an individual—a holding that is directly at odds with numerous decisions of other courts, including the Ninth Circuit, the regional circuit whose jurisdiction includes California. Further compounding its errors and the conflict among lower courts, the court below concluded that the constitutional requirement of "fair notice" was satisfied by Ford's wealth, which purportedly sufficed to put Ford on notice that it could be subjected to a massive punitive damage award at the whim of a California jury based on conduct that occurred a quarter-century ago. Moreover, the court's holding that a single jury could deprive Ford of its total nationwide profits from the 1978 Bronco conflicts with *White v. Ford Motor Co.*, in which the Ninth Circuit rejected such an approach as unconstitutional.

In reinstating the punishment, the court denied Ford any meaningful appellate review. Applying California's exceedingly deferential "substantial evidence" standard, the court characterized its skewed depiction of the "facts" hypothetically found by the jury as the *de novo* review mandated by

Cooper Industries, and then deferred to the arbitrary punishment that the jury picked from thin air.

The court of appeal's ruling defies the constitutional limitations on punitive damages that this Court has repeatedly recognized, and creates or compounds numerous splits among the lower courts concerning the applicability of *BMW* and *Cooper Industries* in the context of product liability cases. There are obvious and straightforward solutions to these problems and conflicts, but only this Court can provide them. Plenary review is warranted. Alternatively, the Court should hold this case pending its decision in *State Farm*.

I. REVIEW IS WARRANTED TO PREVENT NULLIFICATION OF *BMW* IN PRODUCT LIABILITY CASES

The court of appeal interpreted *BMW* in a way that eviscerates all three due process guideposts in product liability cases involving large corporate defendants. Its reasoning typifies the approach followed by many lower courts, conflicts with *BMW* itself and other decisions, and underscores the urgent need for guidance from this Court.

A. The Court Of Appeal's *Per Se* "Gross Reprehensibility" Rule Contradicts *BMW* And Other Decisions

1. This Court's prior decisions analyzing punitive damages for excessiveness have involved *intentional* torts such as fraud and unfair competition; this case, by contrast, alleges a negligently designed vehicle roof. As Justice Kennedy recognized in *TXO Production Corp. v. Alliance Resources Corp.*, punitive damages that would be appropriate in the context of an intentional tort may not be appropriate in "a case of negligence [or] strict liability." 509 U.S. 443, 468 (1993) (Kennedy, J., concurring).

The court of appeal acknowledged that Ford "did not intend" to cause harm, and even applying the deferential "substantial evidence" test, the court could not point to any evidence that any individual Ford employee had acted with

"malice." Pet. App. 32a, 38a. Instead, the court held that the jury was entitled to "infer" malice "by piecing together knowledge and acts" of various unidentified Ford personnel stretching back for decades. *Id.* at 25a. The court recognized that there was no evidence that the Bronco's roof design had ever previously been deemed defective; indeed, plaintiffs' counsel had admitted that, despite a quarter-century's use of over 140,000 of these vehicles, there was no evidence of other lawsuits even *alleging* this design defect. And the evidence is uncontroverted that the design both comported with industry custom and surpassed the federal standards that existed at the time of the design—and that exist today.

The court of appeal, however, rejected these facts as irrelevant to reprehensibility. The court instead invoked the fact that the plaintiffs alleged personal rather than economic injury as a basis for evading *BMW*, Pet. App. 38a ("the award here cannot be compared to cases involving a business fraud resulting only in economic harm") (citation omitted), and it deemed Ford's conduct grossly reprehensible and "despicable" because, for purposes of making a profit, Ford marketed a product that "*could* kill people." *Id.* at 25a-26a (emphasis added); *id.* at 38a (Ford's conduct "involved mass production and marketing" of a product "purely for defendant's economic betterment").

Other courts, like the court of appeal here, have adopted a rule that design defects *per se* reflect serious reprehensibility under *BMW* because the manufacturers "knew" that their products were *capable* of causing serious injury. *See, e.g.*, *Smith v. Ford Motor Co.*, 83 S.W.3d 483, 494 (Ky. 2002) (finding "substantial" reprehensibility where NHTSA had declined to find 1977 design defective and design complied with industry standards, but personal injury resulted many years after design); *Clark v. Chrysler Corp.*, 310 F.3d 461, 482 (6th Cir. 2002) (finding negligent design that comported with federal safety standards reprehensible because it "resulted in the loss of life"); *Williams v. Philip Morris, Inc.*, 48 P.3d 824, 840 (Or. Ct. App. 2002) (reprehensible to market product "that *could* cause serious illness or death") (emphasis

added); *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 46 (Tex. 1998) ("[c]onduct that *endangers* a person's health or safety merits more punishment than purely economic harm") (emphasis added); *cf. Wightman v. Consolidated Rail Corp.*, 715 N.E.2d 546, 554 (Ohio 1999) ("this case distinguishes itself . . . from *BMW*" because it involves "massive property damage" and "physical injuries").

Thus, while this Court in *BMW* stated that "reprehensibility" is "[p]erhaps the most important indicium" of excessiveness, 517 U.S. at 575, these lower courts have rendered that factor meaningless in product liability cases. These courts have misconstrued a passage in *BMW* observing that the harm in that case was "purely economic in nature" and that the defendant "evinced no indifference to or reckless disregard for the health and safety of others" (*id.* at 576) to mean that, where conduct results in personal injury, *BMW* does not require meaningful, objective judicial review of reprehensibility. But this approach "make[s] 'reprehensibility' a concept without constraining force, *i.e.*, [it] deprive[s] the concept of its constraining power to protect against serious and capricious deprivations." *BMW*, 517 U.S. at 590 (Breyer, J., concurring) (discussing Alabama standard).

2. The court of appeal's refusal to consider Ford's reasonable, good faith belief that its conduct was lawful, based (among other things) on its compliance with federal safety standards and industry custom, squarely conflicts with *BMW*. In *BMW*, for example, the jury found that defendant's policy with respect to the disclosure of factory repairs constituted "'gross, oppressive, or malicious' fraud" even though that policy was consistent with statutes defining disclosure obligations in about 25 States. 517 U.S. at 565. Alabama had no such disclosure statute, and this Court "accept[ed] . . . the jury's finding that BMW suppressed a material fact which Alabama law obligated it to communicate." 517 U.S. at 579-80. Nevertheless, this Court recognized that BMW, in attempting to determine what it was required to disclose, "could reasonably rely on [other] state . . . statutes for guidance." *Id.* at 579. The Court also noted that the "diversity"

of state laws "demonstrates that reasonable people may disagree about the value of a full disclosure requirement." *Id.* at 570. The Court concluded that a failure to disclose is "less reprehensible . . . when there is a good faith basis for believing that no duty to disclose exists," *id.* at 579-80, and when "a corporate executive could reasonably interpret" the law to allow nondisclosure. *Id.* at 578.

This same analysis is equally applicable in product liability cases like this one. Even if *some* amount of punitive damages can be imposed because plaintiffs' paid experts disagree with Ford—and with Ford's experts, the federal government, and the entire motor vehicle industry concerning roof design—the existence of grounds for reasonable people to disagree on this issue, and of strong objective indicators that Ford's conduct was both lawful and reasonable, surely is relevant to the reprehensibility analysis, just as the state disclosure statutes were relevant to that issue in *BMW*. The court of appeal, however, rejected any such inquiry here, declaring that "it avails [Ford] nothing that other auto manufacturers also used fiberglass roofs on contemporaneous fiberglass utility vehicles" and dismissing the fact that the 1978 Bronco surpassed 1994 federal roof strength standards by 30 percent as "merely coincidental." Pet. App. 29a, 35a-36a.

The decision below also conflicts with the traditional approach taken by most state and federal courts. Most courts recognize that where there is ground for reasonable disagreement about legal obligations, punitive damages are prohibited. *See, e.g.*, *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995) (vacating award in defective design case where "there is a genuine dispute in the scientific community as to" the reasonableness of the design); *Hillrichs v. Avco Corp.*, 514 N.W.2d 94, 100 (Iowa 1994) (punitive damages inappropriate where "reasonable disagreement" exists over risks and utilities of product); *Jenkins v. Ohio Cas. Ins. Co.*, 794 So. 2d 228, 234 (Miss. 2001) (punitive damages barred where insurer "had an arguable or legitimate basis for denying the claim"). In fact, this proposition is so basic to the law of punitive damages that the Fifth Circuit has held

that it is "plain error"—*i.e.*, "an error so fundamental as to result in a miscarriage of justice"—to permit a jury to award punitive damages where the evidence "demonstrated a good faith dispute" as to whether the defendant's conduct was lawful. *Barber v. Nabors Drilling USA, Inc.*, 130 F.3d 702, 710 (5th Cir. 1997).[6]

Accordingly, some courts not only deem compliance with government safety standards relevant, but hold that it is so plainly inconsistent with a finding of malice or conscious wrongdoing that it bars the imposition of punitive damages altogether. *See, e.g., Richards v. Michelin Tire Corp.*, 21 F.3d 1048 (11th Cir. 1994) (punitive damages prohibited where defendant complied with federal safety standards); *Satcher*, 52 F.3d 1311 (punitive damage award barred where no government agency had ever required certain design feature); W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 233 n.41 (5th ed. 1984) ("In most contexts . . . compliance with a statutory standard should bar liability for punitive damages.").

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[6] A state law that permits a defendant to be punished *at all* where the defendant had reasonable grounds to believe its conduct was lawful raises serious due process concerns. *See, e.g., Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490 (1915) ($6,300 civil penalty violated due process where defendant was "well justified in regarding [its conduct] as reasonable and in acting on that belief" and *even assuming* that defendant "should have known that the Supreme Court of the State . . . might hold the [conduct] unreasonable"). If manufacturers can be punished for selling products that reasonable people could conclude are not defective, the only way they can modify their conduct to avoid punishment is to stop selling all products that might be subject to criticism by a plaintiff's expert. Such a law would violate due process because it would be unconstitutionally vague. *See, e.g., United States v. Powell*, 423 U.S. 87, 93 (1975) (explaining why prohibition against charging an "unreasonable" price for sugar was unconstitutionally vague: "Engaged in a lawful business which Congress had in no way sought to proscribe, [the defendant] could not have charged any price with the confidence that it would not later be found unreasonable.") (emphasis omitted).

Likewise, many courts hold that "[c]ompliance with industry standard and custom serves to negate conscious disregard and to show that the defendant acted with a nonculpable state of mind." *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993); *see also Satcher*, 52 F.3d at 1316-17 (vacating punitive damage award where defendant's design was consistent with that of other manufacturers); *Alley v. Gubser Dev. Co.*, 785 F.2d 849, 856 (10th Cir. 1986) (punitive damages inappropriate where defendant's conduct was consistent with industry practice).

The decision below thus conflicts with both *BMW* and the approach followed in all of these cases, and effectively erases the reprehensibility factor from the constitutional calculus in product liability cases.[7]

3. Review by this Court is imperative if manufacturers are not to be subject to huge punitive damage awards every time a jury, in hindsight, finds a product to be defective. To say, as the court did here, that a manufacturer, to make a profit, marketed a product that "could kill people," simply begs the question as to reprehensibility. That is because *all* manufacturers sell products to make a profit, *all* products can and do cause injury, and *all* design decisions reflect a balance of risks, costs and utility. *See, e.g., Corrosion Proof Fittings v. E.P.A.*, 947 F.2d 1201, 1223 n.23 (5th Cir. 1991) ("over the next 13 years, we can expect more than a dozen deaths from ingested *toothpicks*"); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a (1998).

Many products, like automobiles, by their very nature pose risks of serious injury and death that cannot be materially reduced without significant cost to society in the form of increased prices, less convenience or utility, or even less

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[7] The court's misunderstanding of reprehensibility in the product liability context is further demonstrated by its erroneous reliance on Ford's subsequent design improvement as an aggravating, rather than mitigating, factor (Pet. App. 35a) and by its finding of gross reprehensibility absent any evidence that any individual Ford employee even acted maliciously (*id.* at 32a).

safety in other circumstances. *See generally* W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 550 (2000). The decision as to which design strikes the proper balance among competing interests is often complex and rests upon a "morass of conceptual, political and practical issues on which juries, courts, commentators and legislatures strongly disagree." David G. Owen, *Problems In Assessing Punitive Damages Against Manufacturers Of Defective Products*, 49 U. CHI. L. REV. 1, 37 (1982).

Compounding the problem, jurors are confronted with deciding whether a product creates "too much risk" in the context of individual cases involving tragic personal injuries, using hindsight, on the basis of a highly technical record and arcane and often conflicting opinion testimony from engineers and scientists. Stephen Breyer, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 59 (1992); *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 215-16 (7th Cir. 1990) (Easterbrook, J., concurring).[8] The result is that product liability cases like this one, and like *Smith*, pose great danger that juries will "use their verdicts to express biases against big businesses," *Honda Motor Co. v. Oberg*, 512 U.S. 415, 431-32 (1994), even more so than in cases involving intentional economic torts, such as the fraud claim in *BMW*.

Consequently, guidance from this Court on the "reprehensibility" analysis in product liability cases is especially necessary, because such cases pose the greatest risk that the jury will be overcome by sympathy, bias, passion and prejudice and, as one of the jurors here urged, disregard the law "because saving babies [is] too important." Pet. App. 44a.

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[8] *See also* Viscusi, 52 STAN. L. REV. at 586-90 (noting that jurors often demonstrate bias against companies that engage in risk-safety balancing); Reid Hastie et al., *Looking Backward in Punitive Judgments: 20-20 Vision?*, in Cass R. Sunstein et al., PUNITIVE DAMAGES: HOW JURIES DECIDE 96, 108 (2002) (concluding that "hindsight bias is almost inevitable when jurors make punitive damages decisions").

B. The Court Of Appeal's Disregard For The Ratio Guidepost Contradicts *BMW* And Other Decisions

The court of appeal similarly eviscerated the second *BMW* guidepost—the ratio of punitive to compensatory damages—on the ground that this case involves personal injury. The court acknowledged the "great disparity between the compensatory and punitive damages award," and conceded that "this factor weighs in favor of a finding of excessiveness," but asserted that ordinary ratio analysis simply did not apply because "wrongful death compensatory damages do not fully reflect the harm to the victims." Pet. App. 39a.

The 63:1 ratio is unconstitutional on its face. This Court held in *BMW* that "exemplary damages must bear a 'reasonable relationship' to compensatory damages." 517 U.S. at 580. Although this Court has eschewed "'a simple mathematical formula'" governing excessiveness, it has recognized that historical penalties typically "provided for double, treble, or quadruple damages" and that a 4:1 ratio is "close to the line," 517 U.S. at 581-82 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991)). Numerous courts of appeals have followed this Court's reasoning in rejecting similar ratios. *See, e.g.*, *FDIC v. Hamilton*, 122 F.3d 854, 861 (10th Cir. 1997) (holding that punitive damages generally cannot exceed a 10:1 ratio, and noting that ratios in excess of 4:1 will rarely be upheld); *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 943-44 (5th Cir. 1996) (holding a 6.5:1 ratio excessive).

In fact, in product liability cases, where juries frequently award high compensatory damages that far outstrip any "gain" from the alleged misconduct, *see infra* pp. 22-23, and where the harm caused by the defective design is readily apparent and thus unlikely to escape detection, even a 1:1 ratio will often be grossly excessive because the compensatory award itself is sufficient to deter the misconduct. *See, e.g.*, *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) ("Deterrence . . . operates through the mechanism of

damages that are compensatory.") (emphasis omitted); *Smith v. Wade*, 461 U.S. 30, 94 (1983) (O'Connor, J., dissenting) ("awards of compensatory damages and attorney's fees already provide significant deterrence").

This Court recognized no "wrongful death" exception to the ratio guidepost in *BMW*, and there is no basis for such an approach. In *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 179 (Mo. Ct. App. 1998), for example, the court held that a 27:1 ratio was unconstitutionally excessive in a design defect/wrongful death case when compensatory damages were "large, up to $2.5 million." Here too, plaintiffs received a large $4.6 million compensatory award, and *BMW*'s ratio analysis is fully applicable.

This Court recognized in *BMW* that "perhaps [the] most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." 517 U.S. at 580. The court of appeal's approach effectively nullifies in wrongful death cases a long-recognized, objective and readily ascertainable indicator of excessiveness. This Court's review is warranted.

C. The Court Of Appeal's Holding That The Comparable Penalties Guidepost Is "Inapplicable" Contradicts *BMW* And Other Decisions

The court of appeal improperly rejected the comparable penalties guidepost by focusing, once again, on the presence of personal injuries. The court likened Ford's design of the Bronco roof to "involuntary manslaughter," which in California carries a maximum fine of $10,000 against a corporation, but pronounced the comparable penalties guidepost "inapplicable" because such a comparison "is inappropriate when the malicious conduct could result in substantial imprisonment if committed by an individual instead of a corporation." Pet. App. 39a. By declaring this guidepost simply "inapplicable," the court eliminated from consideration both the most analogous penalty under state law and a directly applicable federal *civil penalty* that could have been imposed

for a design defect. Both at the time of the conduct at issue and at the time of trial, that civil penalty was $1,000 per vehicle, up to a maximum of $800,000 for a defective fleet of vehicles. *See* 49 U.S.C. § 30165(a).

The court's reasoning cannot be reconciled with *BMW*. In *BMW* itself, the conduct in question—repainting new vehicles without telling consumers—was alleged to have constituted fraud, an offense for which an individual could be sentenced to jail. Given that *most* torts that furnish a predicate for punitive damages—*e.g.*, fraud, battery, wrongful death—could also theoretically subject an individual tortfeasor to imprisonment, the court of appeal's holding would render the "comparable penalties" guidepost a nullity in the vast majority of punitive damage cases. Moreover, legislatures know full well that corporations cannot be imprisoned when they establish the maximum fines governing corporate conduct. *See Granite Constr. Co. v. Superior Court*, 149 Cal. App. 3d 465 (1983) (discussing California's involuntary manslaughter statute).

Other courts have nonetheless taken the same approach as the court below. For example, in *Bielicki v. Terminix International Co.*, the Tenth Circuit held that although a "punitive damages award [may be] exceptional when compared only to the applicable fines, the authorization of imprisonment in the criminal context can justify a higher award." 225 F.3d 1159, 1166 (10th Cir. 2000); *see also Mosing v. Domas*, 830 So. 2d 967, 982 (La. 2002) ("While the possible criminal monetary penalty is significantly less than the exemplary damage award in this case, the fact that the offense carries a term of imprisonment makes the difference in monetary penalties less relevant."); *Campbell v. State Farm Mut. Auto. Ins. Co.*, No. 981564, 2001 WL 1246676, at *17 (Utah Oct. 19, 2001) ("Possible imprisonment for [the challenged] conduct is a strong indication that [it] warrants high punitive damages."), *cert. granted*, 70 U.S.L.W. 3580 (U.S. June 3, 2002) (No. 01-1289); *In re Exxon Valdez*, No. A89-0095-CV, 2002 WL 31761256, at *18 (D. Alaska Dec. 9, 2002).

These decisions squarely conflict with rulings from the many courts that *have* looked to comparable fines even when the challenged conduct could have resulted in imprisonment. For example, the Ninth Circuit has held that, under *BMW*, "[c]riminal fines are particularly informative because punitive damages are quasi-criminal." *In re Exxon Valdez*, 270 F.3d 1215, 1245 (9th Cir. 2001); *see also Ace v. Aetna Life Ins. Co.*, 139 F.3d 1241, 1248-49 & n.23 (9th Cir. 1998) ($16.5 million punitive damage award is excessive where it "far exceeds" Alaska's general criminal fine for "scheming to defraud"); *Lee v. Edwards*, 101 F.3d 805, 811-12 (2d Cir. 1996) (considering general criminal fine for "making of a false statement"). *Cf. United States v. Bajakajian*, 524 U.S. 321, 334-35 (1998) (applying "comparable penalty" analysis under Excessive Fines Clause where conduct gave rise to imprisonment). The need for review is particularly compelling here, given the conflicts between the state and federal appellate courts in California.[9]

D. The Court Of Appeal's Use Of Ford's Overall "Wealth" To Trump The *BMW* Guideposts Contradicts *BMW* And Other Decisions

1. The relevance, if any, of a defendant's wealth under *BMW* is a question that has confused and divided the lower

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[9] The court of appeal also rejected the relevance of prior awards affirmed in California when the conduct occurred, once again contradicting the holdings of other courts. *See, e.g., Davis v. Rennie*, 264 F.3d 86, 117 (1st Cir. 2001), *cert. denied*, 122 S. Ct. 1909 (2002); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 577 (8th Cir. 1997); *Patterson*, 90 F.3d at 943. The $290 million punitive damage verdict here is *1,000 times* larger than any other award in a product liability case ever affirmed in California (and U.S.) history at the time of the Bronco's design in the mid-1970s. *See Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) ("As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was $250,000.") (citing David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1329-32 (1976)).

courts and warrants this Court's review. In *BMW*, this Court rejected the claim that a defendant's wealth could justify a heightened penalty: "The fact that [a defendant] is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business. Indeed, [a corporation's] status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce." 517 U.S. at 585.

The court of appeal, however, ultimately upheld the award in this case not on the basis of any of the *BMW* guideposts but by reference to Ford's overall wealth. The court justified its disregard of the *BMW* guideposts by holding that Ford's purported wealth provided "adequate notice of the potential for the punitive damages awarded in this case." Pet. App. 40a. According to the court, Ford "is a huge company with enormous monetary resources" and it should have known that "California regards it as necessary to impose penalties related to the wealth of the defendant in order to achieve the goals of punishment and deterrence." *Id.* at 36a, 40a. Numerous other courts follow this approach.[10]

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[10] *See, e.g.*, *State Farm*, 2001 WL 1246676, at *8 (reinstating punitive award in part because "State Farm's wealth is enormous" and "the jury's punitive damage award of $145 million is only 0.26 of one percent of State Farm's wealth"); *Williams v. Philip Morris, Inc.*, 48 P.3d 824, 841 (Or. Ct. App. 2002) (holding that "the defendant's wealth is an important consideration" in determining excessiveness, and reinstating a $79.5 million punitive damage award on the ground that the award "is equal to a little more than two and a half weeks' profit"); *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1338-39 (11th Cir. 1999) (upholding award under *BMW* and noting that "[defendant] is a large and extremely wealthy international corporation"); *Ammerman v. Ford Motor Co.*, 705 N.E.2d 539, 563 (Ind. Ct. App. 1999) ("Ford knew or should have known" of the potential for a $13.8 million punitive damage award "given that Ford's economic wealth . . . is a factor to be considered in assessing punitive damages"); *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 148 (Iowa 1996) (upholding punitive damage award against a *BMW* challenge on the basis of

The court of appeal's holding that Ford "has been on notice since at least 1971 that a week's profits amounting to about 1 percent of net wealth are not excessive punitive damages," Pet. App. 40a, directly conflicts with *Continental Trend Resources, Inc. v. OXY USA, Inc.*, in which the Tenth Circuit concluded that "a large punitive damage award against a large corporate defendant may not be upheld on the basis that it is only one percent of its net worth or a week's corporate profits." 101 F.3d 634, 641 (10th Cir. 1996). Many courts have similarly held that a corporate defendant's wealth cannot trump the *BMW* standards. *See, e.g., Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 285 F.3d 1146, 1152 (9th Cir. 2002) (on remand) (holding that "in view of the [*BMW*] factors, we cannot conclude that this consideration [of defendant's wealth] renders the amount awarded by the jury constitutional"); *Bowden v. Caldor, Inc.*, 710 A.2d 267, 279 (Md. 1998) ("merely because a defendant may be able to pay a very large award of punitive damages . . . does not justify an award which is disproportionate to the heinousness of the defendant's conduct"); *see also Pulla v. Amoco Oil Co.*, 72 F.3d 648, 659 n.16 (8th Cir. 1995) (retired Justice White, sitting by designation) ("a defendant's wealth cannot alone justify a large punitive damage award").

This Court should grant certiorari and reject this approach as nothing less than an end-run around *BMW*. The court of appeal's ruling demolishes the concept of due process by automatically deeming large corporations to have had "fair notice" of virtually *any* monetary punishment that a jury conceivably could impose. The implicit premise—that if you have money, you are deemed to be on notice that a jury could impose a huge punishment on you—leaves wealthy defendants bereft of meaningful constitutional protection. Even accepting the court of appeal's faulty premise that wealth is a

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[Footnote continued from previous page]

the defendant's "net sales" and "net worth," and asserting that "[o]ne of the factors approved by the Supreme Court . . . for assessing the imposition of punitive damages is the financial position of the defendant").

proxy for notice, it is plainly incorrect to say that Ford was on notice in the 1970s of what its net worth would be at the turn of the century, and thus had fair notice of the penalty that could be imposed retroactively over two decades later.

2. In analyzing the excessiveness of a punitive damage award against a corporation, the relevant financial information, if any, is the monetary "gain," within the State, attributable to the defendant's wrongful conduct. Scholars uniformly recognize that this figure, unlike overall wealth, is rationally related to the societal objective of deterrence where the defendant is a corporation. *See, e.g.*, 2 American Law Institute, *Enterprise Responsibility for Personal Injury: Reporter's Study* 254-55 (1991) ("In determining the size of the award that is sufficient for [deterrence], what is relevant is not the defendant's overall wealth, but rather profit it realized from the particular tortious activity in question."). Indeed, common sense suggests that a profit-motivated entity is not likely to engage in conduct it knows will not be profitable. And as long as any one State does not attempt to deprive the defendant of gain attributable to conduct in other States, there are no extraterritoriality concerns.[11]

In *Cooper Industries*, the Court expressly recognized that a punitive damages award must be tethered to the profits generated by the misconduct at issue, not the defendant's entire profits on the sale of a product. In that case, the wrongful conduct was using a photograph of a competitor's product to market the defendant's similar product. The district court, in affirming a $4.5 million punitive award, might have relied upon the plaintiffs' calculation that the defendant anticipated "gross profits of approximately $3 million" from its sale of its product in the first five years. 532 U.S. at 442. But, as this Court recognized, that was not the proper analysis, because "it would be unrealistic to assume that all of [the defendant's] sales . . . would have been attributable to its mis-

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[11] Due process might, however, prohibit a State from permitting multiple plaintiffs within the State to each recover all of the defendant's statewide gain from the wrongful conduct.

conduct." *Id.* In other words, the defendant's "wrongdoing surely could not be treated as the principal cause of [the defendant's] entire sales volume for a 5-year period." *Id.*

Here, the court of appeal relied on Ford's *total* profits on sales of 1978-1979 Broncos, and reinstated a fine that deprives Ford of *nearly triple* that amount. Pet. App. 36a. But there is no evidence that Ford's allegedly defective roof design was the principal cause of its entire sales volume of the 1978 and 1979 Broncos. Instead, the record reflects that Ford's total "gain" from choosing the design it did over the alternative preferred (in hindsight) by plaintiffs' experts amounts to less than $1.8 million nationwide, and far less in California. *See* Exh. 133.10 (Ford sold 72,700 1978 Broncos and 75,800 1979 Broncos); RT 9532 (cost of design change plaintiffs advocated is $10 to $12 per unit). The court of appeal's decision, by relying on Ford's overall wealth and profits, contradicts *Cooper Industries* and merits review.

II. REVIEW IS WARRANTED TO CLARIFY THE CONSTITUTIONAL LIMITS ON ONE STATE'S POWER TO PUNISH BASED ON OUT-OF-STATE SALES AND PROFITS

As shown above, the court of appeal's reliance on Ford's *overall* profits is contrary to *Cooper Industries*. The court's reliance on Ford's *nationwide* profits defies the federalism, due process and Commerce Clause limits recognized in *BMW* and directly conflicts with the Ninth Circuit's recent decision in *White v. Ford Motor Co.*, 312 F.3d 998 (9th Cir. 2002).

In *BMW*, this Court explained that "each State has ample power to protect its own consumers, [and] none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation." 517 U.S. at 585. To safeguard other States' autonomy, a punishment therefore "must be analyzed in the light of [in-state conduct], with consideration given only to the interests of [the State's] consumers, rather than those of the entire Nation." *Id.* at 574.

The court of appeal held that it could impose extraterritorial punishment because it concluded that, "[u]nlike [the conduct in] *BMW*," Ford's conduct was "unlawful in all states." Pet. App. 38a-39a & n.3. But it is wrong to assume that product liability and punitive damage laws are uniform. These laws vary dramatically. *Cf. White*, 312 F.3d at 1017-19 (noting differences in failure-to-warn and punitive damage laws). Accordingly, the court lacked any basis for concluding that the Bronco's roof design would be deemed defective and punishable in any other State, and in fact that design has never before been found defective since its introduction nearly a quarter-century ago.

The decision below directly conflicts with the Ninth Circuit's recent ruling in *White*, creating a split between California's state and federal courts, and worsening an existing conflict throughout the country. Some courts, like the court below, have rejected the argument that *BMW* limits their ability to impose punitive damages based on a defendant's out-of-state conduct or profits. For example, in *Smith v. Ingersoll-Rand Co.*, the Tenth Circuit approved such punishment because "the manufacture of defective products is not a lawful activity in any of the jurisdictions where the other incidents occurred." 214 F.3d 1235, 1253 (10th Cir. 2000); *Owens-Corning Fiberglas Corp. v. Ballard*, 739 So. 2d 603, 606 (Fla. Dist. Ct. App. 1998) ("where the defendant's conduct is considered tortious in all 50 states . . . the same due process concerns implicated in *BMW* do not arise").

The Ninth Circuit rejected this approach in *White*, where the plaintiffs' counsel made arguments identical to those advanced by plaintiffs' counsel here. In *White*, the plaintiffs alleged a design defect in a different Ford vehicle and urged the Nevada jury to award punitive damages "that would punish Ford for its conduct toward consumers in all states." 312 F.3d at 1015. Just as in this case, "[t]he evidence focused on the number of vehicles Ford sold nationally." *Id.* Indeed, "[t]he entire thrust of [the plaintiffs'] argument was that this Nevada jury now should vindicate the interests of all Ford truck owners everywhere with a verdict that would make the

front page of every newspaper in the country" (*id*).—precisely the same argument plaintiffs' counsel made here. *See* RT 9589 ("You've got to say a number that gets on the front page of every newspaper in the country.").[12]

The Ninth Circuit, however, reversed the punitive damage award in *White*, holding that under *BMW*, "we may not, as a matter of federal law, permit one state to punish . . . nationwide manufacturers for their conduct—actual or hypothetical—in other states." 312 F.3d at 1014 n.62. The court recognized that "*BMW* imposed a territorial limitation on punitive damages in the interest of federalism," and stated that allowing the jury "to measure damages by [the alleged] harm to the whole country" was a "substantive error . . . of federal constitutional law." *Id.* at 1013, 1015-16 & n.69. *See also Sheldon v. Vermonty*, No. 98-2277, 2002 WL 31498908, at *8 (D. Kan. Nov. 8, 2002) (out-of-state injuries irrelevant to excessiveness analysis because "there was no testimony that the people were either from Kansas or harmed in Kansas").

Permitting one State to impose punishment based on profits from sales in other States subjects the defendant to multiple and duplicative penalties on the basis of the same challenged design feature, thus negating all prior and subsequent exonerations. Moreover, this approach invites lay juries to act as national safety regulators. Here, plaintiffs' counsel explicitly urged the jury to "educate NHTSA," overrule the conclusions of the government's experts, and use its punitive damage verdict to force Ford to "[t]ake this car out

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12 *See also* RT 9588 (urging verdict that would generate headlines on "the front page of U.S.A. Today . . . the front page of the New York Times . . . the front page of the Wall Street Journal. We've got somebody's attention. We've got them talking about it in the boardrooms."); RT 9588 ("Billion dollars, why? . . . Number one, we get Ford's attention, get the world's attention and we get those people's attention who are still driving that car. There's 50 to 70 to 80,000 1978-79 Broncos in people's garages with kids right now. . . . Someplace somewhere some mother is taking their kid and strapping them in the back of a 1978 Bronco today.").

of its existence .... [and] stop that mother in Montana from putting her children in the back of that car." RT 9591, 9999.

The *Smith* case also vividly illustrates the problem. In *Smith*, the Kentucky courts actually permitted a Kentucky jury to punish Ford for the sale of vehicles in other States in which juries had rejected the very same claim of defect. Ford's *Smith* Pet. at 17. This case is different from *Smith* only because Ford has had fewer opportunities to litigate the issue, and therefore fewer opportunities for defense verdicts. As plaintiffs' counsel conceded in closing argument, there was no evidence that Ford, in the quarter-century since the 1978 Bronco was introduced, had ever been sued for alleged defects in the 1978 Bronco's roof.

This Court's review is necessary to make clear that the territorial limits on punitive damage awards prevent one jury in a single State from effectively regulating vehicle design on a national scale and displacing and disrupting federal safety regulation and the policies of other States.

III. REVIEW IS WARRANTED TO DETERMINE HOW *COOPER INDUSTRIES*' *DE NOVO* STANDARD APPLIES TO REVIEW OF A JURY'S VERDICT

In *Cooper Industries*, this Court held that appellate courts must review a trial court's ruling on a *BMW* excessiveness challenge under a *de novo* standard. 532 U.S. at 431. The Court also indicated that a reviewing court must generally respect the jury's "specific findings of fact," *id.* at 440 n.12, but it did not elaborate on this point. Although this Court's decisions in *BMW*, *Cooper Industries* and other cases implicitly reject the highly deferential approach followed by the court here, the meaning and application of *de novo* review has divided the lower courts and warrants review.

1. The decision below implicates a direct conflict among the lower courts. The court first reviewed the award under California law "in the light most favorable to the verdicts." Pet. App. 35a. While recognizing that the jury's award was

"somewhat arbitrary" and a "huge windfall," the court emphasized that (for purposes of review under California law) the amount was "'in the discretion of the jury'" and it reinstated the $290 million verdict without considering whether any lesser amount would be sufficient to vindicate California's interests. *Id.* at 33a, 36a-37a. The court then incorporated this same standard in rejecting Ford's *BMW* challenge, stating that "*[a]s we have already discussed*, defendant's conduct was grossly reprehensible." Pet. App. 38a (emphasis added). As a result, the court reviewed "the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor," Pet. App. 20a-21a (citation omitted), and thus deferring to presumed factual "findings" *that the jury never made and was not required to make.*[13]

Other courts follow the same approach. *See, e.g., Central Bering Sea Fishermen's Ass'n v. Anderson*, 54 P.3d 271, 285 (Alaska 2002) (applying *Cooper Industries* and concluding, "as discussed above [in the state-law discussion], the appellants' [actions] reasonably constituted egregious misconduct."); *Williams*, 48 P.3d at 835 (applying *Cooper Industries* and reinstating $79.5 million punitive damages award on basis of what "[t]he jury could find from the evidence").

But other courts have rejected this approach. For example, the New Mexico Supreme Court has expressly recognized—in sharp conflict with the court of appeal in this case—that the *de novo* review required by *Cooper Industries* is different than the substantial evidence standard typically employed by state courts. Under the state-law standard, "evidence is viewed in the light most favorable to the prevail-

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[13] For example, the court declared that Ford's "malice" was demonstrated by "the total absence of preproduction testing" of the Bronco. Pet. App. 29a. Not only was this "fact" never found by the jury—which rendered findings only as to the ultimate questions of defect and malice—but it directly contradicts the record, which establishes that Ford ran its entire "standard menu" of tests for light trucks and utility vehicles "prior to production." RT 6099, 6110.

ing party and all inferences arising from the factual findings of a trial court are indulged in." *Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 49 P.3d 662, 668 (N.M. 2002). In contrast, the *Aken* court held, under the *de novo* review required by *Cooper Industries*, "we are to make an independent assessment of the record," and "[a]nytime the record clearly shows that the jury should not have concluded as it did, the appellate court may, exercising its de novo power, set aside the award." *Id.* at 668, 669; *see also, e.g.*, *Exxon Valdez*, 270 F.3d at 1239 ("a hands-off appellate deference to juries, typical of other kinds of cases and issues, is unconstitutional for punitive damages awards"); *Leatherman Tool Group, Inc.*, 285 F.3d at 1150 (declining to "speculate" as to jury's unstated motivations and reviewing reprehensibility independently). *Cf. Honda*, 512 U.S. at 429 (review limited to a "no substantial evidence" test "provides no assurance that those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of arbitrary amounts"). Review by this Court is warranted to resolve this conflict and confusion.

2. Review also is warranted because the decision below contradicts *BMW*, *Cooper Industries*, and this Court's decisions in analogous areas applying *de novo* review. When this Court reviewed the punitive damage award in *BMW*, it did not, for example, simply assume (consistent with the large punitive verdict) that the jury had found that BMW had no reasonable basis for believing that its disclosures were adequate; on the contrary, this Court reached its own independent conclusion on this issue, holding that state disclosure statutes outside of Alabama gave BMW reasonable grounds for believing that it had met its disclosure obligations in Alabama. 517 U.S. at 579-80. Thus, the Court deferred only to findings of fact that the jury *must* have made (*i.e.*, that BMW suppressed a material fact), while making its own independent determination on a critical, fact-dependent issue on which the jury did not necessarily make any finding at all (whether BMW had reasonable grounds to conclude its conduct was lawful). In *Cooper Industries*, when the Court stated that a

reviewing court should respect "specific findings of fact" made by the jury, 532 U.S. at 440 n.12, it specifically cited these precise pages of *BMW*. 517 U.S. at 579-80.

The Court followed the same basic approach to independent appellate review in considering a First Amendment challenge to a state libel verdict in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989). The Court held that *de novo* review means that, "[i]n determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full" and "examine for [itself] the statements in issue and the circumstances under which they were made." 491 U.S. at 688 (citation omitted). For purposes of the constitutional determination, the Court took into account not the facts the jury "*may* have" found, but only those facts the jury "*must* have" found, "alongside the undisputed evidence." *Id.* at 690-91.

3. Such review is especially crucial to protect against "lawless, biased, or arbitrary verdict[s]," *Honda*, 512 U.S. at 433, in a system that, like California's, provides no meaningful guidance to juries in calculating punitive damages. "Jury instructions typically leave the jury with wide discretion in choosing amounts." *Id.* at 432. In most States, like California, jurors are told "little more than . . . to do what they think is best" and are "left largely to themselves in making this important, and potentially devastating, decision." *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring).[14] Without

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14 *See* CAL. CIV. CODE § 3294; 2 California Book of Approved Jury Instructions, § 14.71, at 247 (9th ed. 2002) (requiring that jury simply be instructed to consider reprehensibility, amount of actual damages, and defendant's financial condition, and that there are "no fixed standards as to the amount . . . of punitive damages"). Thus, in California, as one court has explained, "[t]he channeling of just the correct quantum of bile to reach the correct level of punitive damages is, to put it mildly, an unscientific process complicated by personality differences. . . . And, we have concluded, that is properly so." *Devlin v. Kearney Mesa AMC/Jeep/Renault, Inc.*, 155 Cal. App. 3d 381, 388 (1984).

clear and objective standards restricting the jury's discretion, and in the absence of specific findings of fact, it is rank speculation to assume that the jury premised its fine on certain findings. Here, Ford requested detailed instructions on the amount of punitive damages, but they were rejected. *See* Pet. App. 49a-53a (rejected instructions), 54a (actual instructions). As Justice Breyer explained in *BMW*, "where legal standards offer virtually no constraint, . . . this lack of constraining standards warrants this Court's detailed examination of the award." 517 U.S. at 596 (Breyer, J., concurring).[15]

This case compellingly demonstrates the need for "thorough, independent review," *Cooper Indus.*, 532 U.S. at 441, of punitive damage verdicts. "A verdict returned by a biased or prejudiced jury no doubt violates due process." *Haslip*, 499 U.S. at 41 (Kennedy, J., concurring). But here, notwithstanding the trial court's findings that the jury was biased and prejudiced, the court of appeal simply assumed that that same jury had decided every fact against Ford, and that those imagined "findings" were written in stone. The court of appeal then aggravated its error by relying on its assumption that the trial court "impliedly" endorsed those nonexistent jury findings, even though that same trial court had *overturned the jury's verdict* as "fundamentally suspect." Pet. App. 37a, 45a. This form of appellate review is irrational and unconstitutional, and warrants this Court's review.

CONCLUSION

The Court should grant certiorari and set this case for plenary consideration or, in the alternative, hold this petition pending its decision in *State Farm*. Respectfully submitted.

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15 "[T]he level of punitive damages is not really a 'fact' tried by the jury." *Cooper Indus.*, 532 U.S. at 437 (quotation omitted). Thus, the court below had no more reason to defer to the "huge" and "somewhat arbitrary" amount chosen by the jury than to the hypothetical factual findings the jury never made.

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January 21, 2003

APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JUAN RAMON ROMO, individually and as Administrator, etc., *et al.*, Plaintiffs and Appellants,

v.

FORD MOTOR COMPANY, Defendant and Appellant.

No. F034241
(Super. Ct. No. 82318)

Court of Appeal, Fifth District, California

June 28, 2002

APPEAL from a judgment of the Superior Court of Stanislaus County. Roger M. Beauchesne, Judge.

Counsel:

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Snell & Willmer, Douglas W. Seitz, Richard A. Derevan, Barry C. Toone; Gibson, Dunn & Crutcher, Theodore J. Boutrous, Jr., Mark A. Perry, Tanya M. Acker, William E. Thompson; Dryden, Margoles, Schimaneck, Kelly & Wait and Frank P. Kelly III for Defendant and Appellant.

VARTABEDIAN, Acting P.J.

This case involves an appeal and a cross appeal after the trial court granted in part and denied in part defendant Ford Motor Company's posttrial motions. The court denied defendant's motion for new trial on liability and compensatory damages; denied defendant's motion to reduce punitive damages as excessive; and denied defendant's motion for judgment notwithstanding the verdict (JNOV). From these orders defendant appeals. The court granted defendant's motion for new trial on punitive damages grounded on juror misconduct; from this order plaintiffs appeal.

We will affirm the judgment for compensatory damages as modified by the trial court. We will affirm the trial court's denial of the JNOV motion. We will conclude the punitive damages award was not excessive. However, we will conclude the trial court erred in granting the new trial motion on punitive damages grounded on juror misconduct.

FACTS AND PROCEDURAL HISTORY

Ramon Romo bought a used 1978 Ford Bronco in 1992. On June 20, 1993, Ramon's son, plaintiff Juan Ramon Romo, was driving the Bronco; other members of the family—Ramon, his wife, Salustia, and his children Ramiro, Evangelina, and Maria—were passengers. Juan and Ramon were seated in the front, wearing seat belts. Salustia and Ramiro were in the back seat, also belted. Evangelina and Maria were asleep in the rear of the Bronco, unbelted.

Juan was involved in an accident and the Bronco rolled over several times. The 1978 Bronco had a steel roof over the front one-third of the passenger compartment. The rear two-thirds was made of fiberglass. As the Bronco rolled, the steel roof collapsed, killing Ramon Romo. The fiberglass roof broke loose, striking and killing Salustia and Ramiro Romo. Evangelina and Maria Romo were thrown from the car and injured. Juan remained in the car and was injured.

Juan Romo, individually and as administrator of the estates of the deceased family members, Evangelina Romo, and Maria Irene Romo through her guardian ad litem Juan Romo, sued defendant on theories of products liability and negligence; they sought compensatory and punitive damages.

Defendant did not request a bifurcated trial on the amount of punitive damages. (See Civ. Code, § 3295, subd. (d).)

The unified trial lasted from March 1999 through July 1999. At the conclusion of trial, the matter was submitted to the jury for deliberation on all issues. The jury deliberated for a week and returned a verdict for plaintiffs and against defendant. The jury awarded $6,226,793 in compensatory damages and $290 million in punitive damages. In accordance with the jury's allocation of fault (the jury concluded plaintiff Juan Romo was 10 percent at fault, defendant was 78 percent at fault, and the driver of a second vehicle was 12 percent at fault) and based on certain technical issues concerning damages awarded to the estates, the court reduced the compensatory damages to $4,935,709.10. This reduction is not an issue on appeal. Based on its findings of juror misconduct, which we will discuss in more detail below, the court granted defendant's motion for new trial on the issue of punitive damages.

The parties filed timely notices of appeal.

DISCUSSION

I. *Plaintiffs' Cross-appeal of Juror Misconduct Determination*

Plaintiffs have appealed, primarily, from the court's order granting defendant's motion for new trial on punitive damages. Second, plaintiffs contend the "jury's punitive damage award was not excessive as a matter of California or Federal law." The trial court did not grant the new trial based on excessiveness of damages; instead, it denied the new trial motion "on all other grounds specified" in defendant's notice of

motion for new trial. Plaintiffs, therefore, were the prevailing parties on this issue. We address the issue of excessiveness of damages only in defendant's appeal, in part II of this opinion. In part I, we address the order for new trial on punitive damages based on the trial court's finding of juror misconduct.

A. *Standard of Review*

As recently reiterated by the Supreme Court, an order granting a new trial under Code of Civil Procedure 657 "'must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on [the trial court's] theory.' [Citation.]" (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal. 4th 405, 409.) "The reason for this deference 'is that the trial court, in ruling on [a new trial] motion, sits . . . as an independent trier of fact.' [Citation.] Therefore, the trial court's factual determinations, reflected in its decision to grant the new trial, are entitled to the same deference that an appellate court would ordinarily accord a jury's factual determinations." (*Id.* at p. 412.)

In the context of an order granting or denying a new trial motion on the basis the verdict is "contrary to law or evidence" (Pen. Code, § 1181, subd. 6), the trial court has broad discretion "and there is a strong presumption that it properly exercised that discretion." (*People v. Davis* (1995) 10 Cal. 4th 463, 524.)

When the trial court's order is based on a finding of juror misconduct, however, our deference to the trial court's order is more limited. "We accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.] Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court's independent determination." (*People v. Nesler* (1997) 16 Cal. 4th 561, 582.)

Defendant contends the standard of review of the order granting a new trial is abuse of discretion. Quoting *Malkasian v. Irwin* (1964) 61 Cal. 2d 738, 748, defendant contends, "A trial court's decision granting (as opposed to denying) a new trial on the ground of jury misconduct may be reversed 'only in rare instances and on very strong grounds.'"

Reliance by defendant upon *Malkasian* is misplaced: that case involved misconduct of counsel during the trial. (*Malkasian v. Irwin*, *supra*, 61 Cal. 2d at pp. 745-747.) In evaluating the misconduct of counsel committed in the trial court's presence, that court certainly is in a better position than the appellate court to determine the net effect of such misconduct in the overall context of the trial. By contrast, in the case of juror misconduct occurring outside the presence of the trial court, the Supreme Court specifically has instructed that the reviewing court must independently apply an objective standard to determine whether the misconduct was prejudicial. (*In re Hamilton* (1999) 20 Cal. 4th 273, 296.)

Likewise, defendant's reliance on *Lane v. Hughes Aircraft Co.*, *supra*, 22 Cal. 4th 405 is misplaced. In that case, the court considered the standard of review for a grant of new trial based on excessive damages and insufficiency of the evidence. (*Id.* at p. 412.) In such a case, the trial court sits as an independent trier of fact and, as in the context of *Malkasian v. Irwin*, *supra*, 61 Cal. 2d 738, the trial court "sits much closer to the evidence, . . . watching and hearing as the evidence unfolds. The trial court, therefore, is in the best position to assess the reliability of a jury's verdict and, to this end, the Legislature has granted trial courts broad discretion to order new trials." (*Lane v. Hughes Aircraft Co.*, *supra*, 22 Cal. 4th at p. 412.)

The abuse of discretion test is inapplicable in cases of juror misconduct and, in light of the more recent Supreme Court statements on this point (see also *People v. Cromer* (2001) 24 Cal. 4th 889, 901), we must disagree with the

statement in *Bell v. State of California* (1998) 63 Cal. App. 4th 919, 930-931, to the contrary. We now turn to the evidence upon which we exercise our independent review.

B. *The Juror Declarations*

1. *The Television Program*

Both parties submitted juror declarations in connection with the posttrial motions. The declarations established, and the trial court found, that one juror, Ms. S., brought to the attention of the remaining jurors a segment of the television program *60 Minutes II* dealing with fires in older Ford Mustangs. Uncontested portions of the declarations established that S.'s discussion of the television program occurred during the jury's discussion of the issue of malice, after all issues concerning liability and compensatory damages had been resolved in plaintiffs' favor by unanimous vote of the jury.

Uncontested portions of the declarations established that S. reported to the jury that in the course of the program former Ford president Lee Iaccoca stated that Ford had a policy of contesting or settling lawsuits involving the Mustangs because it was less costly than recalling the vehicles and repairing them. Uncontested portions of the declarations established that S. mentioned the program on one occasion and that her discussion of the program took less than five minutes. Uncontested portions of the declarations established that the jury foreperson, Ms. B., told S. the program was not evidence in the present case and should not be discussed further. S. told the other jurors she agreed and the matter was never raised again.

The trial court made no findings contrary to these undisputed portions of the declarations, although the trial court did find that other persons interviewed in the *60 Minutes II* segment, and not Ford representatives, actually made the claims concerning the decision not to recall the Mustangs.

Conflicting portions of the declarations centered around whether S. said she had watched the program or had been told about it. Further, the declarations conflicted about the context in which S.'s comments were made. The declarations agreed the jurors were in conflict over the type of evidence necessary to show malice, some contending that documentary evidence was necessary. Most declarations stated that S. brought up Iaccoca's purported statements as an example of the manner in which nondocumentary evidence could demonstrate malice as a general matter. The trial court interpreted two other declarations to state that S. proffered Iacocca's statements as evidence of malice in the present case. The trial court did not resolve the conflicts in the evidence, finding only that the declarations "alleged" that S. had made the various statements attributed to her.

The declarations also established that at some point after S. made her statements about the television program, several jurors expressed the belief that the testimony of a particular Ford witness (Mr. Darold) was highly relevant—and damaging to defendant—on the issue of malice. The jury requested a reading of a portion of that testimony. The morning of the read-back, the trial court also reinstructed the jury that it was not to consider outside evidence in connection with the present case. (The parties were concerned about widespread news reports concerning punitive damages awarded by a jury in a case against General Motors.) Only after this reinstruction and after the read-back of testimony did the jury vote, nine to three, in favor of a finding of malice.

2. *The Dream*

The declarations agreed that a juror, Ms. Z., recounted to the jury a dream she said she had the night before. In a scene that kept repeating during the dream, a Ford Bronco rolled over, sequentially killing each of her children and then the children of each of the other jurors. While the Bronco rolled, Z. said, Ford representatives stood by, chanting, "Where's

the proof?" She recounted the dream only one time, during deliberations on the issue of malice; the dream was not discussed at any other time. Z.'s telling of the dream occurred on the fourth day of deliberations, after the votes on liability and compensatory damages, but before the vote on malice.

The declarations conflicted about whether Z. described the dream as an "omen." The trial court did not resolve the conflict in the evidence. Although defendant asserts the trial court "specifically credited evidence that [Juror Z.] . . . relied (and encouraged her fellow jurors to rely) on that dream in determining Ford's liability for punitive damages," the trial court made no such finding. Rather, the court simply set forth the evidence: "This same juror allegedly also told her fellow jurors that her dream was an 'omen,' thereby suggesting that it had some sort of mystical significance regarding how to vote in the case."

Even if we disregard the trial court's use of the word "allegedly"—which is the antithesis of "specifically credit[ing]" the evidence[1]—there is no statement in any of the declarations that Z. claimed her dream had mystical significance. The only statement even marginally related to such a claim was this statement in B.'s first declaration: "In other words, Juror [Z.] personalized her dreams to include, not only her own children, but other jurors' children, and as above stated, stated that [the jury's] job was not about following the law, but 'saving children.'" This statement does not constitute substantial evidence that Z. attached mystical significance to

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[1] For example, in defendant's response brief filed in the cross-appeal, counsel write (with our italics added): "It is also undisputed that during deliberations, Ms. [S.] misattributed the extremely prejudicial quote about settling cases rather than recalling *allegedly* defective vehicles to Mr. Iacocca."

the dream and used it as the basis—in disregard of the law and the evidence—for her votes on punitive damages.

3. *Prejudgment by a Juror*

Although the declarations conflicted greatly on the details, most of the declarations agreed that Z. repeatedly said during deliberations that the jury must "save the babies" by finding defendant liable.

Juror declarations submitted by defendant tied this statement to statements by Z. to the effect that saving lives was too important and the jury did not need to follow the law to accomplish this goal. Of the three declarations submitted by defendant, one stated Z. made these statements "many times during the various days of jury deliberation" and "on several of the deliberations days" (Juror H.), one declaration stated Z. made the statements on the first day of deliberations only (Juror W.), and one declaration stated she made the statements on the first two days of deliberations only (Juror B.).

Juror declarations submitted by plaintiff stated that Z. expressed particular concern because the rear roof of the Bronco was made of fiberglass, affording the least protection in a rollover accident, yet people tended to put their babies in the back seat of a car to try to give them added safety. She said defendant would not do anything to remedy the situation if the jury did not punish it. Z. and other declarants specifically denied Z. said the jury did not need to follow the law. Four of the six juror declarations submitted by plaintiff state that early in the deliberations there was a discussion about the need to follow the law, that the foreperson (B.) reiterated that the jury had to follow the law, and that all jurors agreed they needed to and would follow the law.

Various of the declarations alleged and denied that Z. said she had made up her mind about the case during the trial and that the jury should treat "as evidence" the statements of one of plaintiffs' attorneys.

The trial court did not expressly resolve the conflicts in the evidence, although the court did state its conclusion that "[j]uror misconduct occurred by virtue of the injection of external evidence and influences, prejudgment of the case and a refusal to follow the law. The alleged misconduct occurred on the second day of deliberations."

C. *The Trial Court's Conclusion*

In its written order granting a new trial on punitive damages, the trial court recounted in detail the contents of the three juror declarations submitted by defendant. The court then wrote:

> "The Court finds that the counter-declarations submitted by plaintiffs fail to rebut the presumption of prejudice in this case. Juror misconduct occurred by virtue of the injection of external evidence and influences, prejudgment of the case and a refusal to follow the law. The alleged misconduct occurred on the second day of deliberations. The jury voted 12-0 on the issues of liability and compensatory damages. However, the jury voted 9-3 on the issues of malice and the amount of punitive damages.
>
> "Because there was a bare majority on the issues of malice and the amount of punitive damages and because the standard of proof as to malice is so high, the Court finds the deliberative process on these two (2) issues was presumptively infested with passion and prejudice as to render the verdict on punitive damages fundamentally suspect. If not singly, then in combination, the juror misconduct described above was presumptively prejudicial and such presumption has not been rebutted.

> "Despite admonitions from the Court, in essence, not to consider anything but the facts and the law, and despite other jurors' admonitions not to consider the external evidence and influences discussed above, the jury was being told not to think of the proverbial pink elephant. The damage was presumptively done."

D. *The Issue of Presumptions*

Jury deliberations are secret while they are occurring. No verbatim transcript or other record of the deliberations normally exists. Declarations seeking to reconstruct deliberations after the fact may be colored by the jurors' natural inclination to protect or attack the process that resulted in the verdict, depending on whether the juror agreed or disagreed with the verdict. (See *Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal. 3d 98, 108-109.) Yet, the parties' right to a jury trial is one of constitutional dimension, and we give great deference to a verdict issued by a properly instructed jury—in the normal case, without any inquiry whatsoever into the processes used to reach that verdict. Even when there are allegations of jury misconduct, evidence of the jurors' mental processes is, "with narrow exceptions," excluded from consideration of the right to a new trial. (*In re Hamilton, supra*, 20 Cal. 4th at pp. 294-295.)

Common experience requires that we recognize that while the "jury system is . . . legally fundamental . . . [it is] also fundamentally human." (*People v. Marshall* (1990) 50 Cal. 3d 907, 950.) Jurors bring to their deliberations knowledge, beliefs, personalities, and intellectual capacities, which the judicial system must accept as both a strength and a weakness of the jury system. (*Ibid.*; see also *People v. Keenan* (1988) 46 Cal. 3d 478, 541.)

Faced with the twin facts that jurors are allowed great freedom in their conduct of deliberations and that a court can never know exactly what influences resulted in a particular

verdict, our judicial system has established certain presumptions for reviewing allegations of juror misconduct.

Jurors ordinarily are presumed to have followed the court's instructions. (*People v. Sanchez* (2001) 26 Cal. 4th 834, 852; *Craddock v. Kmart Corp.* (2001) 89 Cal. App. 4th 1300, 1308.) "The California Supreme Court has consistently stated that on appeal, '[w]e must, of course, presume that the jury followed [the trial court's] instructions . . . .' (*People v. Chavez* (1958) 50 Cal. 2d 778, 790.) . . . 'In the absence of evidence to the contrary, the presumption [that the jury adhered to the limiting instructions] will control.' (*People v. Beach* (1983) 147 Cal. App. 3d 612, 625.)" (*People v. Zack* (1986) 184 Cal. App. 3d 409, 416.)

On the other hand, "[j]uror misconduct, such as the receipt of information about a party or the case that was not part of the evidence received at trial, leads to a presumption that the defendant was prejudiced thereby and may establish juror bias." (*People v. Nesler*, *supra*, 16 Cal. 4th at p. 578.) "To succeed [on a claim of jury misconduct, a party] must show misconduct on the part of a juror; if he does, prejudice is presumed; [the opposing party] must then rebut the presumption or lose the verdict." (*People v. Marshall*, *supra*, 50 Cal. 3d at p. 949.)

The presumption of prejudice in a civil case is rebutted if the reviewing court reaches one of three conclusions: (1) the record establishes the absence of prejudice; (2) a review of the entire record shows there is no reasonable probability of actual harm to the complaining party under the constitutional standard of *People v. Watson* (1956) 46 Cal. 2d 818, 836 (see *Hasson v. Ford Motor Co.* (1982) 32 Cal. 3d 388, 416-417; *McDonald v. Southern Pacific Transportation Co.* (1999) 71 Cal. App. 4th 256, 265); or (3), in the case of possible "actual bias" of a juror whose vote may have been determinative of the verdict, there is no substantial likelihood that at least one juror was impermissibly influenced. (See

Province v. Center for Women's Health & Family Birth (1993) 20 Cal. App. 4th 1673, 1679-1680, disapproved on other grounds in *Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal. 4th 30, 41; see also *Weathers v. Kaiser Foundation Hospitals, supra,* 5 Cal. 3d 98, 110.)

The interaction of the two foregoing presumptions is seen in *People v. Marshall, supra,* 50 Cal. 3d 907. In that death penalty case, during the jury's penalty phase deliberations, a juror claiming a law enforcement background stated to the other jurors that the absence of a known criminal record for the defendant was not determinative because "'juvenile records are automatically sealed at 18 years of age.'" (*Id.* at p. 949.) The Supreme Court concluded that this was misconduct that raised a presumption of prejudice. (*Id.* at p. 951.) However, the court then applied the presumption that the jury would understand and follow the instructions from the court; those instructions, in this particular case, rendered the issue of a prior criminal record immaterial to the penalty determination. (*Id.* at p. 952.) Accordingly, the court held, the record established that the presumption of prejudice was rebutted. (*Id.* at p. 951.)

E. *Analysis*

As noted, the trial court did not expressly resolve the many factual conflicts presented by the various declarations. Implicit in the court's conclusion, however, is a finding that the declarations submitted by plaintiffs were credible at least to the extent they described the verbal response of other jurors, the timing of the remarks by S. and Z., and the uncontradicted fact that the remarks were not the subject of discussion after the read-back of the testimony of the Ford employee, Darold. Thus, the court concluded: "Despite admonitions from the Court, in essence, not to consider anything but the facts and the law, and despite the other jurors' admonitions not to consider the external evidence and influences discussed above, the jury was being told not to think of the

proverbial pink elephant. The damage was presumptively done." The only claims that other jurors admonished Jurors S. and Z. were contained in the declarations submitted by plaintiffs.

Despite this finding concerning jury self-admonition, it appears to us the trial court applied only the presumption that jury misconduct is prejudicial and, without any evidentiary basis for doing so, failed to consider and apply the presumption that jurors have followed the instructions they were given. In our independent review of the issues of prejudice and rebuttal of the presumption of prejudice, we conclude the record provides no basis to reject the normal presumption the jury followed the instructions. Accordingly, as we explain, we conclude the presumption of prejudice is rebutted.

The declarations establish that S. made her comments about the *60 Minutes II* segment on Thursday or Friday. Also prior to the weekend, the jury asked the court for a read-back of a portion of Darold's testimony concerning Ford's state of knowledge. Over the course of the ensuing weekend, there was substantial news coverage of a massive punitive damages verdict rendered in a case against General Motors during the previous week. As a result of concern that the jury might be influenced by the size of the General Motors verdict, the court—without any explanation to the jury about *why* it was doing so—instructed the jury prior to the commencement of deliberations on the following Monday, July 12, 1999:

"Ladies and gentlemen, you're going to resume your deliberations here shortly, but just a reminder to you: During the course of the trial, the Court admonished you that you are not to read or listen to or pay attention to any news accounts concerning this case; that you are to decide this case based on the law and the facts of the evidence that was presented to you during the course of the trial. The Court wanted to repeat that admonition to you that again you are to decide this

case based on the law, the facts and the evidence that are presented to you during the course of the evidence in the trial. You are not to read or listen to or consider, if you have, taken [*sic*] into account any newspaper articles concerning this case, any radio accounts or any television or any other media accounts concerning this case or any other case. You are to decide this case based on the facts and the law and the evidence presented during the course of this trial; okay?"

In addition, there is no conflict in the evidence showing the foreperson of the jury admonished S. that the *60 Minutes II* segment could not be used as evidence in the present case, nor is there conflict in the evidence showing S. expressly agreed with this admonition. There is no conflict in the evidence showing that the *60 Minutes II* issue was never mentioned again after this exchange between the foreperson and S. Because the jury is presumed to have followed the court's subsequent instruction to decide the case only on the evidence and law presented, and because there is no evidence to overcome that presumption, we conclude the presumption of prejudice from mention of the *60 Minutes II* segment is rebutted by the record. (*People v. Marshall*, *supra*, 50 Cal. 3d at p. 952.)

Similarly, Z.'s dream was never the subject of discussion after the court's admonition of Monday, July 12, 1999. We digress to note that defendant has not cited any cases for the proposition that having or talking about a dream while serving on a jury constitutes misconduct. Having a dream, in itself, cannot be considered the receipt of extrinsic evidence by the dreamer, since the dream is entirely an internal affair. The report of the dream—Z.'s statements to her fellow jurors—seems to us well within the realm of permissible rhetorical devices, merely another way of saying that the speaker finds the evidence very persuasive and that she fears other similar accidents if the product were not to be recalled by the manufacturer. Certainly such a statement in the latter terms

would not constitute misconduct. No reason occurs to us why the use of the dream formulation to increase the rhetorical impact of the statements would be any less permissible. (Cf. *Iwekaogwu v. City of Los Angeles* (1999) 75 Cal. App. 4th 803, 819.)

To return to our main point: even assuming the dream statements constituted misconduct, they were brief, the dream was not claimed to be evidence, and the dream was not discussed after the July 12, 1999, admonition. Because the jury is presumed to have followed the instruction to decide the case only on the evidence and law presented, and because there is no evidence to overcome that presumption, we conclude any presumption of prejudice from the dream statements is rebutted by the record. (*People v. Marshall*, *supra*, 50 Cal. 3d at p. 952.)

The greatest level of conflict in the declarations concerns the claims that Z. said she had prejudged the case and said the jury did not "need to follow the law" because of an overriding responsibility to "save the babies." Those jurors who claimed Z. voiced an intention to disregard the law all said she made these statements on the first day or the first couple of days of deliberations. It was during this time that the jury deliberated the issues of liability and compensatory damages. There is no indication in any of the declarations that Z. made similar statements during the more contentious punitive damages deliberations. In fact, it is uncontradicted that the statements ceased well before the court's July 12, 1999, admonition to decide the case on the evidence alone. Because the jury is presumed to have followed the instruction to decide the case only on the evidence and law presented, and because there is no evidence to overcome that presumption, we conclude the presumption of prejudice from Z.'s possible expressions of prejudice and refusal to follow the law is rebutted by the record. (*People v. Marshall*, *supra*, 50 Cal. 3d at p. 952.)

A similar issue arose in *People v. Harper* (1986) 186 Cal. App. 3d 1420. In that murder case, the jury was having trouble interpreting the instructional definition of murder. A juror brought in a dictionary and read to the other members the dictionary definition of murder. That juror "was immediately cautioned by other members of the jury that his definition could not be considered." (*Id.* at p. 1428.) Seeking further instruction from the trial court, the jury sent out a note that disclosed that the juror had consulted the dictionary. (*Ibid.*) The trial court then brought out the jury, explained generally why dictionary definitions are not applicable in criminal prosecutions, and admonished the jury to "put aside any discussion or consideration" of the dictionary definition. (*Id.* at p. 1429.)

The appellate court held: "Absent evidence to the contrary, a jury is presumed to follow the instructions of the trial court. Having been given a specific admonishment in light of misconduct by one of their members, it seems probable the jurors would more closely adhere to the instructions of the trial court and thus reduce the chance for prejudice." (*People v. Harper*, *supra*, 186 Cal. App. 3d at pp. 1429-1430.) Agreeing with the trial court's conclusion, the reviewing court stated: "[I]t was unnecessary to rely on a presumption the jurors . . . followed the admonition when the declarations [of the jurors] made clear there was no further discussion of the dictionary definition." (*Id.* at p. 1430.) The court concluded the presumption of prejudice arising from the juror's misconduct had been rebutted. (*Ibid.*; see also *People v. Pinholster* (1992) 1 Cal. 4th 865, 925.)

In the present case, of course, the jury did not inform the trial court that there had been reference by a juror to a television program and an appeal by another juror to the overriding moral necessity of saving the lives of children. Nevertheless, the court fortuitously instructed the jury to confine its deliberations and consideration of the case solely to the evidence

presented at trial. The instruction did not mention the General Motors verdict that had caused the parties to request it; for all the members of this jury knew, the court somehow had ascertained that extraneous materials were being mentioned in the jury room. In any event, the record is clear that none of the misconduct was repeated in any manner after the court's admonition. As in *People v. Harper*, *supra*, 186 Cal. App. 3d at page 1430, the record rebuts the presumption of prejudice arising from the jury misconduct in this case.

Finally, we consider whether the evidence establishes that, even if the record rebuts the presumption of prejudice as to the jury as a whole, there is a substantial likelihood that a juror necessary to the punitive damages verdict prejudged the case. (See *Province v. Center for Women's Health & Family Birth*, *supra*, 20 Cal. App. 4th at pp. 1678-1679.) "For a juror to prejudge the case is serious misconduct." (*Clemens v. Regents of University of California* (1971) 20 Cal. App. 3d 356, 361.) Thus, where a juror initially failed to disclose his prejudgment of the case during voir dire and subsequently repeated that prejudged position throughout the trial and deliberations, the court found prejudicial misconduct. (See *id.* at pp. 365- 366.) Similarly, where a juror prejudged the case and coerced the rest of the jury into an immediate vote without any deliberation, the court found prejudicial misconduct. (*Province v. Center for Women's Health & Family Birth*, *supra*, 20 Cal. App. 4th at pp. 1678, 1680.)

In this case, the trial court impliedly found that Juror Z. stated to the other jurors that she had made up her mind about the case prior to the completion of all the testimony.

For reasons similar to those stated above, however, we find that Z.'s initial statements concerning readiness to decide the case without regard to the law does not rise to the level of prejudicial misconduct found in the foregoing cases. Rather, the record establishes that while early in the deliberations Z. may have misunderstood the nature of the jury's

function, the other jurors—particularly the foreperson, identified as a deputy district attorney—admonished her concerning the necessity to follow the law as instructed by the court. None of the juror declarations contend Z. persisted in a refusal to consider the law and the evidence, and several declarations—including Z.'s—state that she affirmatively agreed that the jury needed to follow the law. On this record, it is not substantially likely that Z. prejudged the case and failed to decide the case on the law and evidence presented at trial. (*In re Hamilton, supra,* 20 Cal. 4th at p. 296.)

F. *Conclusion*

Defendant urges that we adopt what amounts to a rigid rule that prejudicial misconduct cannot be cured either by jury self-admonition or by admonitions from the trial court. Such a contention ignores the very purpose of permitting and requiring jury deliberations: through group discussion of the law and the evidence, our common law system trusts that jurors who express wrong ideas about the evidence, the law, and their duty as jurors will be guided to a correct view of the case. In the absence of an opportunity for jurors to express such wrong conceptions and thereafter change their thinking, a jury trial might just as well conclude with the submission of ballots from the jury box at the close of the case.

Despite defendant's consistent attempts to portray this as a case of jurors run amok, the misconduct in the present case does not begin to approach the pervasive and insistent misconduct that resulted in reversal in such cases as *People v. Nesler, supra,* 16 Cal. 4th 561, *Province v. Center for Women's Health & Family Birth, supra,* 20 Cal. App. 4th 1673, and *Clemens v. Regents of University of California, supra,* 20 Cal. App. 3d 356. Instead, in the present case, by all of the evidence in the record, the collective process of jury deliberation resulted in disabusing jurors S. and Z. of any misconceptions they may have had concerning their duty as

jurors to follow the law and consider only the evidence at trial. As such, the presumption of prejudice was rebutted.

II. *Defendant's Appeal*

Defendant appeals from the trial court's order denying its motion for JNOV on the issue of punitive damages. Defendant also appeals from the trial court's denial of defendant's new trial motion on liability and compensatory damages. Finally, defendant contends the punitive damages award is the "grossly excessive product of bias, passion and prejudice."

We will address these issues in the following order. First, we will consider whether substantial evidence supports the jury's finding on malice, the linchpin of its punitive damages verdict. Next, we will address the issue of excessiveness of punitive damages. Because we have found there was no prejudicial jury misconduct, the claim that the trial court erred in denying a new trial on liability and compensatory damages—a claim premised on the same allegations of jury misconduct—is moot.

A. *Substantial Evidence*

Defendant contends "plaintiffs failed as a matter of law to prove that Ford can be held liable for punitive damages." "This argument calls for our determining whether substantial evidence supported the jury's verdict." (*Hardison v. Bushnell* (1993) 18 Cal. App. 4th 22, 25-26.)

1. *Standard of Review*

"'Where findings of fact are challenged on a civil appeal, we are bound by the "elementary, but often overlooked principle of law, that . . . the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the findings below. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal. 2d 427, 429.) We must therefore view the evi-

dence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court.' (*Jessup Farms v. Baldwin* [(1983)] 33 Cal. 3d [639,] 660.)" (*Thompson v. Tracor Flight Systems, Inc.* (2001) 86 Cal. App. 4th 1156, 1166.)

On appeal from an order denying judgment notwithstanding a jury's verdict, we independently apply the same standard as the trial court, that is, the substantial evidence test stated above. (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal. App. 4th 234, 259.) Thus, where the trier of fact has concluded "that the clear and convincing standard has been met, and there is substantial evidence to support it, then we must affirm." (*Mike Davidov Co. v. Issod* (2000) 78 Cal. App. 4th 597, 606.)

Our standard of review is no different where, as here, the challenge to the sufficiency of the evidence arises in the context of a punitive damages verdict. Defendant seeks support for a heightened standard of review by relying upon the maxim that California law "disfavors punitive damages." That reliance is unavailing.

Defendant's premise is correct, in a limited way: When the issue is whether to permit administrative agencies to award such damages in the absence of a legislative mandate (see *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal. 3d 1379, 1392) or to permit lost punitive damages as a component of compensatory damages in legal malpractice suits (see *Piscitelli v. Friedenberg* (2001) 87 Cal. App. 4th 953, 981-982), the common law indeed disfavors expanding the availability of punitive damages.

Where the Legislature has provided for such damages under specified conditions, however, it is the function of the judiciary to review a jury verdict pursuant to the law as written—not to favor or disfavor, approve or disapprove, the

Legislature's choice in providing for such damages. "The judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies embodied in such legislation; absent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function." (*Superior Court v. County of Mendocino* (1996) 13 Cal. 4th 45, 53.) (We consider defendant's constitutional arguments later.)

Defendant also suggests our review of the verdict and of the order denying the JNOV motion must be elevated beyond ordinary substantial evidence review because the punitive damages statute (Civ. Code, § 3294) requires proof of malice by clear and convincing evidence. This contention is wrong if, by it, defendant means to imply that we give less deference to the facts and inferences found by the trier of fact.

Defendant's contention, understood in this way, ignores the fact that courts routinely apply the substantial evidence standard in criminal cases, where the burden of proof is beyond a reasonable doubt. (See, e.g., *People v. Lewis* (2001) 25 Cal. 4th 610, 642; *People v. Marshall* (1997) 15 Cal. 4th 1, 34; *People v. Johnson* (1980) 26 Cal. 3d 557, 578.)

We reiterate, then, that in reviewing a punitive damages verdict, just as in reviewing a criminal verdict or an ordinary civil verdict, we give full deference to the trier of fact. Thus, even though the Legislature added a "clear and convincing evidence" requirement to the punitive damages statute, it did not alter "the standard of our review (all we are required to find is substantial evidence to support a determination by clear and convincing evidence [citation]) . . . ." (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal. App. 4th 1269, 1287.)

2. *Corporate State of Mind*

Defendant contends the evidence was insufficient to prove it acted with malice in designing and manufacturing

the 1978 Bronco or in failing to warn consumers about the absence of rollover protection. Underlying this argument is a fundamental misconception of the required proof, stated in defendant's reply brief as follows: "Section 3294 [authorizing punitive damages] makes absolutely clear that plaintiffs were required to introduce clear and convincing proof that *at least one particular Ford employee, officer, director or managing agent* had the requisite malicious state of mind in 1978." (Italics in original.)

Since 1980, Civil Code section 3294, subdivision (b), has provided, in relevant part: "With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." The purpose of the amendment was to clarify the existing common law requirement that corporate malice occur at the level of "employees [who] exercised substantial discretionary authority over decisions that resulted in an 'ad hoc formulation of policy' . . . ." (*White v. Ultramar, Inc.* (1999) 21 Cal. 4th 563, 571, citation omitted.)

In adopting the amendment, the Legislature sought language that would express the requirement that punitive damages liability for employers requires more direct involvement by the employer than ordinary respondeat superior liability, but also sought to make clear that such liability did not attach only to the acts of those "employed in a managerial capacity." (See *White v. Ultramar, Inc.*, *supra*, 21 Cal. 4th at pp. 571, 576.) The adopted language reflects a legislative intent "that principal liability for punitive damages not depend on employees' managerial level, but on the extent to which they exercise substantial discretionary authority over decisions that ultimately determine corporate policy. Thus, supervisors who have broad discretionary powers and exercise substantial discretionary authority in the corporation could be managing agents." (*Id.* at pp. 576-577.)

In *White v. Ultramar, Inc., supra*, the Supreme Court concluded that the present version of Civil Code section 3294, subdivision (b), sought to preserve the pragmatic stance adopted in *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal. 3d 809, 822-823. "*Egan* observed that a corporate defendant should not be able to shield itself '"from liability by giving an employee a nonmanagerial title and relegating to him crucial policy decisions."'" (*White v. Ultramar, Inc., supra*, 21 Cal. 4th at p. 571.) The operative inquiry is whether the employee's exercise of discretion results in actual, even if "ad hoc," corporate policy. (*Ibid.*)

In most of the cases in which the "managing agent" issue has resulted in reversal of a punitive damages award, initial liability arises from a particular tortious act of an employee of the corporation. (See, e.g., *Cruz v. HomeBase* (2000) 83 Cal. App. 4th 160, 167; see also *White v. Ultramar, Inc., supra*, 21 Cal. 4th at p. 577.) Defendant has cited no case, and our own research has failed to disclose any case, in which a series of corporate actions and decisions, such as the design, production, and marketing of an automobile, has been found inadequate to support an award of punitive damages on the basis that the multitude of employees involved in various aspects of the process were not high enough in the corporate chain of command. When the entire organization is involved in the acts that constitute malice, there is no danger a blameless corporation will be punished for bad acts over which it had no control, the primary goal of the "managing agent" requirement. (Cf. *Grimshaw v. Ford Motor Co.* (1981) 119 Cal. App. 3d 757, 814.)

There is no requirement that the evidence establish that a particular committee or officer of the corporation acted on a particular date with "malice." A corporate defendant cannot shield itself from liability through layers of management committees and the sheer size of the management structure. It is enough if the evidence permits a clear and convincing

inference that within the corporate hierarchy authorized persons acted despicably in "willful and conscious disregard of the rights or safety of others." (See Civ. Code, § 3294, subd. (c)(1).)

A plaintiff may satisfy the "managing agent" requirement of Civil Code section 3294, subdivision (b), through evidence showing the information in the possession of the corporation and the structure of management decisionmaking that permits an inference that the information in fact moved upward to a point where corporate policy was formulated. These inferences cannot be based merely on speculation, but they may be established by circumstantial evidence, in accordance with ordinary standards of proof.

Defendant contends, in addition, that plaintiffs failed to prove defendant engaged in "despicable" conduct within the meaning of Civil Code section 3294, subdivision (c)(1). This argument focuses on individual acts and decisions of defendant's employees, while complaining that plaintiffs attempt to "create a composite picture of alleged 'maliciousness' by imputing to some fictional monolith bits and pieces of supposed knowledge of many different people on many different topics through many different decades."

Stripped of pejorative innuendo, defendant clearly is a "fictional monolith": corporations are legal constructs—legal fictions (*Francis T. v. Village Green Owners Assn.* (1986) 42 Cal. 3d 490, 507)—and defendant is a single such construct. It is difficult to imagine how corporate malice could be shown in the case of a large corporation except by piecing together knowledge and acts of the corporation's multitude of managing agents.

Defendant also asserts that plaintiffs are "unable to present evidence of any 'malicious or despicable' conduct with respect to the design and production of the 1978 Bronco." This ignores the fact that the design and production of the vehicle was the despicable conduct: we think it obvious that

putting on the market a motor vehicle with a known propensity to roll over and, while giving the vehicle the appearance of sturdiness, consciously deciding not to provide adequate crush protection to properly belted passengers (in the words of a corporate memo introduced in evidence, "penalizing" passengers for wearing a seatbelt) constitutes despicable conduct. Such conduct could kill people. The question is not whether the conduct, if it occurred, was despicable, the question is whether there is sufficient evidence from which a rational trier of fact could find that the knowing conduct occurred.

Defendant's attack on the sufficiency of the evidence includes discussions of the evidence of a manufacturing defect and of defendant's failure to include rollover warnings with the 1978 Bronco. We will not examine this evidence, since plaintiffs did not rely on it to prove malice. Instead, we will turn directly to the third component of plaintiffs' case, proof of a design defect.

Attacking the sufficiency of the evidence of design defect, defendant contends plaintiffs' own evidence showed "conclusively" that negligent *manufacture* of the Bronco, not negligent design, caused the deaths and injuries involved in this case. Had it not been for defective welds along the roof pillar, "the metal portion of the roof would not have crushed," according to defendant; "if the roof had not crushed in the entire Romo family . . . would have 'walked away' from the accident." This claim wholly ignores the requirement that we view the evidence in the light most favorable to the verdict, as we will explain.

Plaintiffs did present evidence that the Bronco was not only poorly designed but that it also was negligently manufactured. Plaintiffs presented testimony from a metallurgy/materials-failure expert, Dean Jacobson, to the effect that the front roof pillar was negligently welded. And he testified that those welds failed and caused the passenger side of

the Bronco's roof to "splay out" as it collapsed. But he also testified that if the welds had been good, only the passenger side of the steel roof "would have stayed up. It would have mitigated the amount of intrusion on the right side [of the steel roof] and I believe basically the right side would have stayed up."

Jacobson did not testify that, in the absence of faulty welds, the entire Romo family would have walked away from the accident. To the contrary, defendant objected to Jacobson's expressing any opinions at all about the cause of the passengers' injuries, since he was not a biomechanics expert. However, Jacobson testified that the rear roof—the molded fiberglass roof—"would have been gone" even if the welds had been in accordance with the design specification. Of equal importance, Jacobson testified that if defendant had installed the type of integrated roll bar it initially planned for the 1978 Bronco and had installed the type of steel roll bar at the rear of the fiberglass roof that defendant did include on the 1980 Bronco, the roof would not have crushed despite the negligent welds. Thus, in essence, Jacobson testified that the design defects were a sufficient independent cause of the steel roof's collapse during the rollover.

Defendant's quotation from the record concerning the "entire Romo family" walking away from the accident if the roof did not collapse came from a different witness, plaintiffs' biomedical engineering expert, Martha Bidez. Her testimony had nothing to do with the causes for the collapse of the roof. Instead, she took the sequence of events established by the accident reconstruction expert and opined concerning the manner in which the various victims' injuries occurred during the course of the accident. For example, after the witness described the mechanism by which the minor victims were injured, she was asked, "Why didn't they sustain skull fractures like other members of the family?" Bidez answered, "The children in the back did not sustain skull frac-

tures because the roof did not crush in on top of them and the roof did not strike them in the head. [¶] The roof struck their mother and their brother, and [the girls] were able to simply be deposited out on the highway. There was no roof crush; that is what caused the death of their father."

To provide a summarization of Bidez's testimony, counsel asked, "If the roof doesn't crush in, what happens to the members of this family?" Bidez answered, "If the roof doesn't crush in . . . the Romo family stays intact. Every one of the family members . . . walk away from this collision."

We have engaged in this rather extended exposition of the evidence to demonstrate a point defendant repeatedly ignores in its briefs: substantial evidence review requires examination of all the evidence, not just selective portions of the evidence favorable to the appellant, and it requires evaluation of that evidence in the light most favorable to the verdict, not an interpretation that ignores the inferences drawn by the trier of fact. (*Jessup Farms v. Baldwin* (1983) 33 Cal. 3d 639, 660.) We will not repeat the exercise of fully demonstrating defendant's selective use of the evidence in each instance as we discuss its arguments; it will suffice to say that defendant's briefs repeatedly ignore this "elementary, but often overlooked principle" (*Crawford v. Southern Pacific Co.*, *supra*, 3 Cal. 2d 427, 4290) of appellate law.

Further attacking the sufficiency of the evidence of design defect, defendant contends the metal portion of the 1978 Bronco roof was "ahead of its time regarding roof strength." It contends the evidence established that there was no federal standard for roof strength when the Bronco was manufactured, but that the vehicle far exceeded the passenger car standard that existed then and exceeded the current light truck standard. "These facts, as a matter of law, preclude the imposition of punitive damages," according to defendant.

Viewing the evidence in the light most favorable to the verdict, however, a rational trier of fact could conclude that it

was merely coincidental that the Bronco met the later federal standards, and that this coincidence—occurring years after the design and production of the 1978 Bronco—did not reflect the corporate state of mind prevailing at the time in question. The standard for award of damages under Civil Code section 3294 is malice in fact (*Taylor v. Superior Court* (1979) 24 Cal. 3d 890, 894); the question of such malice does not turn on whether the relevant conduct is or is not reasonable in light of later-developed standards of care.

Instead, substantial evidence permits an inference that defendant's policymakers were strongly motivated to bring the 1978 Bronco to market and knew they could not do so if they followed the routine practice of preproduction testing and development. Substantial evidence supports an inference that, in order to bring the product to market, defendant's policymakers decided to disregard established policies by which defendant had determined that crush resistance needed to be higher (the twice-the-curb-weight standard) and that fiberglass or molded plastic should not be used for components comprising the passenger compartment unless underlain by a steel skeleton. Given the existence of these corporate standards and the total absence of preproduction testing, a rational finder of fact could infer that the failure to design and test the 1978 Bronco to meet these standards reflected "a willful and conscious disregard of the . . . safety" (Civ. Code, § 3294, subd. (c)(1)) of those who would travel in the Bronco.

In a similar manner, defendant attacks the sufficiency of the evidence of design defect of the fiberglass portion of the roof by pointing out plaintiffs' expert testimony that having a

removable roof on the Bronco was reasonable[2] and that defendant's designated "most knowledgeable" representative testified that, like a convertible's cloth top, the fiberglass roof was not designed to survive a rollover accident.

However, other evidence permitted a reasonable trier of fact to conclude that defendant's decision to put the unreinforced fiberglass roof was despicable because defendant knew that:

> —unlike convertible passenger cars, the high center of gravity of truck-based utility vehicles made them more likely than passenger cars to roll over;
>
> —defendant's safety engineers previously had concluded unreinforced fiberglass should never be used for a part of a vehicle intended to enclose the passenger compartment and had concluded no utility vehicle should be produced without a roll bar—and that the original design for the 1978 Bronco, in fact, included a roll bar as standard equipment;
>
> —the competitor's removable fiberglass roof did contain metal reinforcement;
>
> —defendant's own testing conducted after production and delivery of the 1978 Bronco

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[2] The expert did not testify that an *unreinforced* fiberglass roof was reasonable. He merely testified that a removable roof was reasonable. The earlier version of the Bronco, for example, had a removable steel roof. He was highly critical of the use of unreinforced fiberglass, combined with the absence of a roll bar, for the 1978 Bronco. In other words, contrary to the implication of defendant's excerpt, plaintiffs' expert did not express approval of the fiberglass roof on this vehicle.

> (testing defendant consciously decided not to undertake in order to bring the product to market more quickly, despite such testing as a routine part of product development for other vehicles) showed the roof failed to meet defendant's safety standards and led defendant to include steel reinforcement in the 1980 Bronco.

In light of this credible evidence, it is frivolous to contend, based on defendant's excerpts from the record, that "Ford's decision to incorporate a fiberglass roof into certain vehicles—even if retrospectively deemed incorrect two decades after the fact—was not, as a matter of law, a 'vile' or 'loathsome' act that can support an award of punitive damages," as defendant says in its opening brief.

Finally, defendant contends that the decision to use an unreinforced fiberglass top on the 1978 Bronco was never disclosed to "top management," citing the testimony of a former Ford executive who testified on behalf of plaintiff. The testimony of the former Ford executive, Thomas Feaheny, was somewhat different than represented by defendant. Feaheny testified: "The decision to put [the fiberglass top] on that vehicle was not a top management decision. It was made in the truck operations and the truck department. And I guess I'm fairly confident that they never disclosed to higher management that there was this risk" that the fiberglass roof "almost inevitably" would fail in a rollover accident.

Nevertheless, Feaheny testified that in the ordinary course of business, the responsible executives *within* the light truck division would have known about the safety engineers' conclusions concerning the use of unreinforced fiberglass for passenger compartment panels. These executives clearly had the power within the corporation to enforce or not enforce as company policy the safety engineers' findings.

As stated previously, the test for whether malicious conduct is attributable to a corporation is whether the acts were done by a person or persons with authority to make ad hoc policy decisions on behalf of the corporation. (*White v. Ultramar, Inc.*, *supra*, 21 Cal. 4th at p. 577.) Defendant does not contend, nor could it, that employees on the assembly line decided what roof to put on the Bronco or to delete the roll bar as standard equipment. Such decisions obviously were made with the input of many persons, but ultimately became policies of the corporation despite corporate knowledge that the choices entailed risk of death and serious injury.

The statutory standard for corporate malice does not require, as defendant contends, that a "Ford officer, director, or managing agent believed that the company was compromising consumer safety by reducing costs or expediting production." It will suffice if the evidence, in the light most favorable to the verdict, establishes that corporate policymakers *in fact* compromised consumer safety by reducing costs or expediting production in *willful and conscious disregard* of consumer safety. "[M]alice does not require actual intent to harm .... Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences." (*Angie M. v. Superior Court* (1995) 37 Cal. App. 4th 1217, 1228.)

In the present case, the direct and circumstantial evidence, together with the inferences therefrom, is sufficient to permit a rational trier of fact to clearly and convincingly conclude that defendant acted with malice in its design and introduction into the market of the 1978 Bronco.

B. *Claim of Excessiveness of Punitive Damages*

The trial court denied defendant's motion for a new trial on "all other grounds" stated in defendant's motion, apart from the jury misconduct basis upon which it granted the motion. Among those grounds upon which the motion was

denied was the claim that the amount of punitive damages was excessive. On appeal, this claim has three components: (1) The jury improperly was permitted to consider defendant's overall size and worth in setting the amount of the award; (2) the amount of the award is factually insupportable; and (3) the "unprecedented" size of the award violates defendant's due process right to notice of the penalty that it might incur at the time it acts maliciously.

1. *Review Under California Law*

"The amount of punitive damages is determined in the discretion of the jury. An appellate court will not reverse the jury's determination unless the award as a matter of law is excessive or appears so grossly disproportionate to the relevant factors that it raises a presumption it was the result of passion or prejudice . . . . In reviewing the verdict the appellate court is guided by three main factors: the reprehensibility of the defendant's conduct, the actual harm suffered by the victims, and the wealth of the defendant." (*Rufo v. Simpson* (2001) 86 Cal. App. 4th 573, 623, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal. 3d 910, 927-928; see also *Zaxis Wireless Communications, Inc. v. Motor Sound Corp.* (2001) 89 Cal. App. 4th 577, 583.)

The second of the three considerations as set out in *Rufo v. Simpson*, *supra*, 86 Cal. App. 4th at page 623, harm to the victims, is sometimes described instead as "the amount of damages." (See *Lane v. Hughes Aircraft Co.*, *supra*, 22 Cal. 4th at p. 417 (conc. opn. of Mosk, J.).) The "amount of damages" in many cases provides an adequate and convenient measure of the harm to the victims. In some instances, however, tort law, for historical reasons, undervalues noneconomic damages and the compensatory damages award is not a reliable measure of the injury to the victims. Wrongful death is among such instances: "In an action by the representative of a decedent's estate, the punitive damages must be compared to the actual harm suffered by the decedent, not the

limited economic damages recoverable by the estate." (*Rufo v. Simpson*, *supra*, 86 Cal. App. 4th at p. 623, fn. 15; see also *Neal v. Farmers Ins. Exchange*, *supra*, 21 Cal. 3d at p. 929.) Therefore, we look to the "actual harm" suffered by the victims as a result of defendant's malicious conduct in our review of the punitive damages award. (*Id.* at p. 928.)

While we clearly must consider the degree of injury to the victims as part of our review of the punitive damages award for excessiveness, neither the Legislature nor the judiciary has established a fixed ratio between the compensatory and punitive damages that provides a standard for determining excessiveness. (See *Lane v. Hughes Aircraft Co.*, *supra*, 22 Cal. 4th at p. 417 (conc. opn. of Mosk, J.); *id.* at p. 428 (conc. opn. of Brown, J.).) Rather than focus on any one of the three factors specified by the Supreme Court in *Neal*, our task is to evaluate all three factors in light of the entire record. (*Adams v. Murakami* (1991) 54 Cal. 3d 105, 110.) "[T]he key question before the reviewing court is whether the amount of damages 'exceeds the level necessary to properly punish and deter.'" (*Ibid.*, quoting from *Neal v. Farmers Ins. Exchange*, *supra*, 21 Cal. 3d at p. 928.)

We also note that the trial court, sitting as an independent trier of fact (see *Sierra Club Foundation v. Graham* (1999) 72 Cal. App. 4th 1135, 1160), rejected the claim that the punitive damages were excessive. The trial court's evaluation of the evidence gives added weight to the jury's determination that $290 million is an appropriate award to punish and deter this defendant: The trial court "sits much closer to the evidence than an appellate court. Even the most comprehensive study of a trial court record cannot replace the immediacy of being present at the trial, watching and hearing as the evidence unfolds. The trial court, therefore, is in the best position to assess the reliability of a jury's verdict and, to this end, the Legislature has granted trial courts broad discretion" in deciding whether to order a new trial, including a new trial

on the excessiveness of punitive damages. (*Lane v. Hughes Aircraft Co.*, *supra*, 22 Cal. 4th at p. 412.)

We turn now to the factors prescribed by the Supreme Court in *Neal v. Farmers Ins. Exchange*, *supra*, 21 Cal. 3d at page 928.

Rather incredibly, defendant contends its conduct—even viewed in the light most favorable to the verdicts—"was at the very lowest end of the reprehensibility spectrum." We disagree.

Involuntary manslaughter is the unlawful killing of a human being, inter alia, "in the commission of a lawful act which might produce death . . . without due caution and circumspection." (Pen. Code, § 192.) Involuntary manslaughter is a felony. As we have concluded above, the evidence supports the jury's conclusion that defendant willfully and consciously ignored the dangers to human life inherent in the 1978 Bronco as designed, resulting in the deaths of three persons. Such corporate conduct can constitute involuntary manslaughter (see *Granite Construction Co. v. Superior Court* (1983) 149 Cal. App. 3d 465) and, when viewed in the context of a mass-produced vehicle sold to the public, certainly is seriously reprehensible conduct.

Further, defendant ignored its own internal safety standards while leaving the Bronco with the appearance of incorporating a roll bar into the vehicle's roof structure. Defendant declined to test the strength of the Bronco's roof before placing the vehicle in production, and when it did test the roof strength in conjunction with the redesign of the Bronco for the 1980 product line, defendant concluded the roof in fact failed to meet its own standards. Defendant modified the roof for the 1980 Bronco, but it did nothing to remedy the structural inadequacies in the tens of thousands of 1978 and 1979 Broncos that were already on the road. In this context—in contrast to the issue of defendant's underlying negligence, not contested on this appeal—it avails defendant

nothing that other auto manufacturers also used fiberglass roofs on contemporaneous fiberglass utility vehicles.

The harm to the victims is obvious and severe. Defendant does not contend otherwise.

The final issue is whether the punitive damages award is excessive in light of defendant's financial condition. There is no doubt that $290 million is a lot of money. It is also true, however, that defendant is a huge company with enormous monetary resources. At the time of trial, defendant had daily after-tax profits of $20 million and its net worth was $25 billion, of which $14 billion was in cash on hand. Defendant earned well over $100 million in profit from the 1978 and 1979 Bronco. As far as the present record shows (see *Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal. App. 4th 1645, 1660-1661), defendant had enjoyed the use of that profit for more than two decades without being penalized in any case for punitive damages arising from the design of the 1978-1979 Bronco.

There is no doubt that $290 million would be a huge windfall to the Romo family. (See *College Hospital Inc. v. Superior Court* (1994) 8 Cal. 4th 704, 712.) The windfall to victims of malicious torts, however, is simply a side effect of our common law system for punishing and deterring wrongdoers. The fact that such damages are a windfall is not irrelevant: it was a major consideration in the Supreme Court's decision to place the burden of proof for punitive damages upon the plaintiff. (*Adams v. Murakami, supra*, 54 Cal. 3d at p. 120.) The windfall nature of the damages is not, however, a consideration in determining whether such damages are excessive as a matter of law. (Cf. *Neal v. Farmers Ins. Exchange, supra*, 21 Cal. 3d at p. 929.)

It is empirically impossible, of course, to know exactly the level of punitive damages that would have a sufficient punitive and deterrent effect without unduly stifling innovation and competition in the marketplace. Any determination

of an amount of punitive damages by a jury or by this court on appeal is, in this sense, somewhat arbitrary. The jury and the trial court each concluded $290 million provided sufficient punishment and deterrence. That damages award is 1.2 percent of defendant's net worth and nine days of its profits at the time of trial. Although these amounts are slightly higher than the award approved in *Neal v. Farmers Ins. Exchange*, *supra*, 21 Cal. 3d at page 929, when we consider that defendant had the use of its 1978-1979 Bronco profits of over $100 million for 20 years prior to the verdict, we cannot conclude the level of damages is excessive.

2. *Review Under Federal Constitution*

In the recent case of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 431-433 [121 S. Ct. 1678, 1683], the United States Supreme Court held that a party raising due process challenges to a punitive damages verdict is constitutionally entitled to de novo review by the appellate court. Such review is limited to the constitutional issues raised. Determinations of fact by the jury (and impliedly reaffirmed by the trial court in denying the new trial motion on excessiveness of damages) are accepted on appeal unless not supported by substantial evidence.

This due process limitation, apparently arising from both the excessive fines clause of the Eighth Amendment and from the due process clause of the Fourteenth Amendment (see *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, *supra*, 532 U.S. at p. 434 [121 S. Ct. at p. 1684]), requires a reviewing court to determine whether the damages award is "grossly excessive." (*Ibid.*) "Only when an award can fairly be categorized as 'grossly excessive' in relation to the [state's legitimate interests in punishment and deterrence] does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." (*BMW of North America, Inc. v. Gore*, (1996) 517 U.S. 559, 568 [*BMW*].) In order to avoid such arbitrariness, even when the

state has a strong interest in preventing particular conduct, state law must provide notice not only of "the conduct that will subject [a defendant] to punishment, but also of the severity of the penalty that a State may impose." (*Id.* at p. 574; see also *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, *supra*, 532 U.S. at p. 434 [121 S. Ct. at p. 1684].)

In *BMW*, the Supreme Court noted certain "guideposts" to assist its determination whether the defendant had received adequate notice of the severity of the penalty that might be imposed on it. Those were "the degree of reprehensibility of the [conduct]; the disparity between the harm or potential harm suffered by [plaintiff] and his punitive damages award; and the difference between [the punitive damages award] and the civil penalties authorized or imposed in comparable cases." (*BMW*, *supra*, 517 U.S. at p. 575.) As noted, however, the ultimate question is whether the award is grossly excessive in relation to the interests the state seeks to protect through the award. (*Id.* at p. 568.)

As we have already discussed, defendant's conduct was grossly reprehensible. While defendant did not intend the death to the victims, the award here cannot be compared to cases "involving a business fraud resulting only in economic harm." (*Rufo v. Simpson*, *supra*, 86 Cal. App. 4th at p. 624.) Further, the malicious conduct involved mass production and marketing of the dangerous vehicle purely for defendant's economic betterment. (See *Grimshaw v. Ford Motor Co.*, *supra*, 119 Cal. App. 3d at pp. 819-820.) Unlike *BMW*, where the defendant's conduct was not even unlawful in all states and involved only economic consequences, the conduct here placed tens of thousands of lives at risk and actually claimed three such lives in the present case. The *BMW* court was able to conclude: "In this case, none of the aggravating factors associated with particularly reprehensible conduct is present. The harm BMW inflicted on Dr. Gore was purely economic in nature." (*BMW*, *supra*, 517 U.S. at p. 576.) In

the present case, by contrast, the reprehensibility factor weighs heavily against a finding that the punitive damages award is grossly excessive.

There is a great disparity between the compensatory and punitive damages award. While this factor weighs in favor of a finding of excessiveness, the importance of the factor is somewhat reduced, as we have explained above, because wrongful death compensatory damages do not fully reflect the harm to the victims.

Finally, the nature of the conduct involved in the present case makes inapplicable the third *BMW* factor, comparison with civil fines for similar conduct. Such a comparison is appropriate when the conduct to be punished cannot result in imprisonment if committed by an individual, but is inappropriate when the malicious conduct could result in substantial imprisonment if committed by an individual instead of a corporation. (See *BMW*, *supra*, 517 U.S. at pp. 583-584, distinguishing *Pacific Mutual Life Insurance Co. v. Haslip* (1991) 499 U.S. 1, 22.)[3]

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[3] Defendant also contends that a California plaintiff seeking a punitive damages award based, in part, on a defendant's financial condition must prove the defendant's profits from California only and in some manner allocate the defendant's net worth to its California operations. In *BMW*, *supra*, 517 U.S. at page 585, the individual state's punitive damages award effectively sought to impose Alabama's unique "regulatory policies on the entire Nation." If the issue in the present case were an automaker's willful disregard of California's unique and stringent emission standards, there might be merit to defendant's contention that the financial condition evidence should target only defendant's California operations. Here, by contrast, the interest California seeks to protect—individual human lives—is neither unique to California nor limited to its own citizens: any 1978 Bronco operated on California highways creates the same risks to its occupants no matter where the vehicle was sold nor where its occupants reside.

Defendant contends that no California case has awarded anywhere near $290 million in punitive damages and, accordingly, defendant lacked notice of "the severity of the penalty that a State may impose," as required by *BMW*. (See *BMW*, *supra*, 517 U.S. at p. 574.) The Penal Code, in language unchanged since its initial adoption in 1872, however, provides clear notice that killing a human being "in the commission of a lawful act which might produce death . . . without due caution and circumspection" is manslaughter. (Pen. Code, § 192, subd. (b).) Defendant has been on notice "for more than a century" that California regards it as necessary to impose penalties related to the wealth of the defendant in order to achieve the goals of punishment and deterrence. (See *College Hospital Inc. v. Superior Court*, *supra*, 8 Cal. 4th 704, 712.) And defendant has been on notice since at least 1971 that a week's profits amounting to about 1 percent of net wealth are not excessive punitive damages. (See *Neal v. Farmers Ins. Exchange*, *supra*, 21 Cal. 3d at p. 929, citing *Wetherbee v. United Ins. Co. of America* (1971) 18 Cal. App. 3d 266, 271.) Taken altogether, these factors provided defendant adequate notice of the potential for the punitive damages awarded in this case.

We note that neither the United States Supreme Court nor any California court has held that a jury's consideration of the size and resources of a defendant invalidates a punitive damages award. Rather, the courts recognize that a defendant's wealth cannot be the sole criterion for the size of a punitive damages award: ability to pay an award cannot justify an *otherwise excessive* punitive damages award. (See *BMW*, *supra*, 517 U.S. at p. 585.)

Here, the punitive damages verdict was not "otherwise excessive"; instead, consideration of the size and net worth of a corporate defendant was necessary if the jury was to appropriately vindicate the state's interest in protecting the lives of its citizens.

DISPOSITION

The order granting defendant's motion for new trial is reversed. In all other respects, the judgment is affirmed. Plaintiffs are awarded costs on appeal.

VARTABEDIAN, Acting P. J.

WE CONCUR:

Buckley, J.

Cornell, J.

APPENDIX B

STANISLAUS COUNTY SUPERIOR COURT,
STATE OF CALIFORNIA

JUAN RAMON ROMO, et al.,
vs
FORD MOTOR COMPANY

NATURE OF HEARING: LAW AND MOTION
CASE NO. 82318
JUDGE: ROGER M. BEAUCHESNE
Bailiff: L. Weaver
Clerk: P. Murray
Reporter: None
Date: Sept. 15, 1999
MODESTO, CA

Appearances:

None

This matter came on calendar on September 10, 1999 upon defendant Ford Motor Company's Motion for Judgment Notwithstanding the Verdict, Motion for a New Trial, and Motion to Tax Costs.

Upon due consideration of the written Points and Authorities submitted by counsel and the oral arguments proffered on September 10, 1999, the Court renders the following decisions on the Motion for Judgment Notwithstanding the Verdict and Motion for a New Trial. There having been insufficient time to hear the arguments on Ford's Motion to

Tax Costs, said motion is continued to October 8, 1999 at 8:30 a.m. in Department 5.

I.

Motion for Judgment Notwithstanding the Verdict

The Court DENIES defendant Ford Motor Company's Motion for Judgment Notwithstanding the Verdict in its entirety.

II.

Motion for New Trial

(A) The COURT GRANTS Ford Motor Company's Motion for a New Trial on the issue of punitive damages; *i.e.*, on both the issue of whether Ford was guilty of malice and the amount of punitive damages, if a subsequent jury finds malice.

(B) The COURT GRANTS Ford Motor Company's Motion for a New Trial on the issue of compensatory damages (economic damages) for the Estates of Ramon Romo and Salustia Romo subject to the condition that the motion for a new trial on this issue is DENIED if plaintiff(s) consent(s) to a reduction to $5,000.00 as to each of the estates.

(C) The COURT DENIES Ford Motor Company's Motion for a New Trial on all other grounds specified in its Notice of Motion for a New Trial.

III.

Specification of Grounds and Reasons for Granting a New Trial On the Issue of Punitive Damages

The COURT grants Ford Motor Company's motion for a New Trial on the issue of malice and punitive damages based upon misconduct of the jury. (CCP section 657(2)). Declarations submitted by both plaintiffs and defendant established that the jurors were exposed to, and injected into the jury room, a television program regarding allegations of defective Ford vehicles. One juror, even if not having seen the pro-

gram, told other jurors of a "60 Minutes II" program which aired on May 19, 1999 and that featured alleged fire problems from rear-end collisions involving older Ford Mustangs in which drop-in fuel tanks were punctured. This juror allegedly told the other jurors that Ford's former president, Lee Ioccoca—who headed Ford while the Bronco was being developed and whose name was mentioned frequently during trial—said on the program that Ford had a policy to defend or settle lawsuits rather than recalling or correcting vehicles. In fact, the Court's review of the exhibit (the videotape) reveals Mr. Ioccoca made no such comment. The 60 Minutes program also featured graphic depictions of the burn injuries suffered by victims of Ford's alleged misconduct.

At least two (2) juror declarations state that the juror who mentioned the 60 Minutes program told the other jurors that the program was evidence of Ford's malice regarding the 1978 Bronco.

Additionally, after repeatedly telling the jurors that they needed to "save the babies", another juror told the jury in great detail of a morbid nightmare she supposedly had the night before in which her child and the other jurors' children were killed by a repeatedly rolling-over Bronco while the Ford attorneys and witnesses armed with guns, mockingly chanted, "Where's the proof, where's the proof?" This same juror allegedly also told her fellow jurors that her dream was an "omen", thereby suggesting that it had some sort of mystical significance regarding how to vote in the case. She allegedly also urged her fellow jurors that they "did not need to follow the law because saving babies was too important." This same juror allegedly stated that what one of the plaintiffs' attorneys said "should be considered as evidence."

A litigant is entitled to a fair trial, not necessarily a perfect trial. A fair trial encompasses a fair deliberative process by the trier of fact—in this case a jury of twelve (12) persons. The Court finds that the counter-declarations submitted by

plaintiffs fail to rebut the presumption of prejudice in this case. Juror misconduct occurred by virtue of the injection of external evidence and influences, prejudgment of the case and a refusal to follow the law. The alleged misconduct occurred on the second day of deliberations. The jury voted 12-0 on the issues of liability and compensatory damages. However, the jury voted 9-3 on the issues of malice and the amount of punitive damages.

Because there was a bare majority on the issues of malice and the amount of punitive damages and because the standard of proof as to malice is so high, the Court finds the deliberative process on these two (2) issues was presumptively infested with passion and prejudice as to render the verdict on punitive damages fundamentally suspect. If not singly, then in combination, the juror misconduct described above was presumptively prejudicial and such presumption has not been rebutted.

Despite admonitions from the Court, in essence, not to consider anything but the facts and the law, and despite other jurors' admonitions not to consider the external evidence and influences discussed above, the jury was being told not to think of the proverbial pink elephant. The damage was presumptively done.

Fairness dictates a new trial on the issues of malice and punitive damages.

IV.

Specification of Grounds and Reasons for Granting Conditional New Trial on the Issue of Compensatory Damages (Economic Damages) for the Estates of Ramon Romo and Salustia Romo

The Court grants a conditional new trial on this issue on the ground that the damages awarded were excessive. (CCP section 657(5)). As a matter of law, the estates of Ramon and Salustia Romo are limited to recovering damages suf-

fered during the period between the accident and death. (CCP section 377.34). Therefore, the awards of $183,988.00 and $295,645.00 in economic damages to the estates have no legal or evidentiary foundation. They are excessive and improper.

Therefore, the Court grants Ford Motor Company's Motion for a New Trial on the issue of compensatory damages (economic damages) for the Estates of Ramon Romo and Salustia Romo subject to the condition that the motion for a new trial on this issue is denied if plaintiff(s) consent(s) to a reduction to $5,000.00 as to each of the estates (CCP section 662.5(b)).

IT IS SO ORDERED.

Date: Sept. 15, 1999

/s/
ROGER M. BEAUCHESNE
Judge of the Superior Court
Stanislaus County

cc: Joseph W. Carcione, Jr., Esq.
Lawrence Drivon, Esq.
Douglas Seitz, Esq.

MINUTE ORDER

APPENDIX C

Court of Appeal, Fifth Appellate District - No. F034241
S108991

IN THE SUPREME COURT OF CALIFORNIA

En Banc

SUPREME COURT
FILED
OCT 23 2002
Frederick K. Ohlrieh Clerk
Deputy

JUAN RAMON ROMO et al.,
Plaintiffs and Appellants,

v.

FORD MOTOR COMPANY,
Defendant and Appellant.

Petition for review DENIED.

Kennard, J., Baxter, J., and Brown, J., are of the opinion the petition should be granted.

The requests for an order directing depublication of the opinion are denied.

/s/
Chief Justice

APPENDIX D

FORD'S PROPOSED JURY INSTRUCTION NO. 75

Requested by Plaintiff		Requested by Defendant	√
Given as Requested		Given as Modified	
Given on Court's Motion			
Withdrawn			
Refused	X	Judge	

Punitive damages are an extraordinary remedy. They are not favored in the law and should be given only in extreme cases, with caution and within narrow limits.

FORD'S PROPOSED JURY INSTRUCTION NO. 76

Requested by Plaintiff		Requested by Defendant	√
Given as Requested		Given as Modified	
Given on Court's Motion			
Withdrawn		_____	
Refused	X	Judge	

You may not award punitive damages merely because you have found by a preponderance of the evidence that the product was defective or that Defendant was negligent. An honest mistake or error of judgment does not constitute malice. Neither does extreme incompetence. Rather, you may award punitive damages only if you find by clear and convincing evidence that Defendant had no arguably legitimate reasons for designing the product as it did. In other words, you may award punitive damages only if you find by clear and convincing evidence that the risks of the product's design so greatly outweigh the benefits that no reasonable person could have concluded that the product was not defective. Thus, you may not award punitive damages if reasonable people can disagree about whether the products was defective.

FORD'S PROPOSED JURY INSTRUCTION NO. 77

Requested by Plaintiff		Requested by Defendant	√
Given as Requested		Given as Modified	
Given on Court's Motion			
Withdrawn			
Refused	X	Judge	

You may not award punitive damages merely because you find that Defendant considered cost in designing the product. A responsible manufacturer must consider the costs in designing products that are affordable to the anticipated users of its product.

FORD'S PROPOSED JURY INSTRUCTION NO. 78

Requested by Plaintiff		Requested by Defendant	√
Given as Requested		Given as Modified	
Given on Court's Motion			
Withdrawn			
Refused	X	Judge	

In determining the amount of punitive damages, the most important factor to consider is the reprehensibility or blameworthiness of Defendant's conduct. In evaluating the reprehensibility of Defendant's conduct, you must consider, for example (1) the fact that the Ford Bronco met and exceeded Federal Motor Vehicle Safety Standards, (2) the extent to which the product complied with industry custom and practice, (3) the absence of any objective test from which Defendant could determine in advance whether the Bronco was defective under California law, (4) the likelihood that injury would occur, Defendant's awareness, if any of the likelihood of harm, and its motivation; and (5) the duration of Defendant's misconduct, if any, and whether it attempted to conceal such misconduct.

FORD'S PROPOSED JURY INSTRUCTION NO. 79

Requested by Plaintiff		Requested by Defendant	√
Given as Requested		Given as Modified	
Given on Court's Motion			
Withdrawn			
Refused	X	Judge	

Punitive damages ordinarily cannot be awarded where the manufacturer has designed its product consistent with industry custom and practice. If you find that the design of this model Bronco complied with industry custom and practice and with government regulations and standards, you should not award punitive damages.

APPENDIX E

TRIAL COURT'S INSTRUCTIONS TO THE JURY REGARDING AMOUNT OF PUNITIVE DAMAGES

. . .

The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice.

In arriving at any award of punitive damages, you are to consider the following:

(1) The reprehensibility of the conduct of the defendant.

(2) The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition.

(3) That the punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiffs.

. . .